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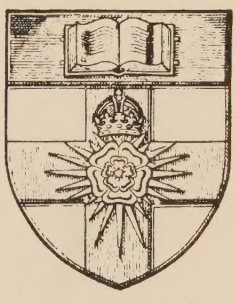

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IN

THE KING'S BENCH DIVISIONS

OF

THE HIGH COURTS OF JUSTICE,

AND ON APPEAL THEREFROM IN

THE COURTS OF APPEAL

IN THE IRISH FREE STATE

AND

IN NORTHERN IRELAND.

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Lords Justices of Appeal.

(IN THE IRISH FREE STATE.)

The Right Hon. Stephen Ronan.
The Right Hon. James O'Connor.

Supreme Court.

(IN THE IRISH FREE STATE.)

Hugh Kennedy C.J.
The Right Hon. Charles Andrew O'Connor.
Gerald FitzGibbon.

Lords Justices of Appeal.

(IN NORTHERN IRELAND.)

The Right Hon. William Moore.
The Hon. James Andrews.

King's Bench Division.

(IN THE IRISH FREE STATE.)

The Right Hon. Thomas Francis Molony, C.J. (Ir.)
The Right Hon. William Houston Dodd.
The Right Hon. Jonathan Pim.
The Right Hon. Arthur Warren Samuels.

Judges of the High Court.

(IN THE IRISH FREE STATE.)

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James Creed Meredith.
The Right Hon. Thomas Lopdell O'Shaughnessy.
William John Johnston.
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(IN NORTHERN IRELAND.)

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Irish Land Commission.

The Hon. William E. Wylie.

Attorneys-General.

(IN THE IRISH FREE STATE.)

Hugh Kennedy K.C.
John O'Byrne K.C

(IN NORTHERN IRELAND.)

The Right Hon. Richard Best K.C.

[These Reports will be cited as follows :—[1924] 2 I. R.]

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Chancery Division and Bankruptcy,	C. Norman Kough,	Barrister-at-Law.
King's Bench Division, Nisi Prius, and Probate, and Irish Land Commission,	T. C. Tobias, Hector Hughes,	Barristers-at-law.

(IN NORTHERN IRELAND.)

James M'Connell, Barrister-at-Law.

MEMORANDUM.

The Constitution of the Irish Free State (as set out in the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922), and in the Irish Free State Constitution Act, 1922 (13 Geo. 5, Sess. 2, c. 1), Sch. I) provided (Art. 64) for the establishment of a High Court and a Court of Final Appeal, to be called the Supreme Court, and these Courts were established in the Irish Free State by the Courts of Justice Act, 1924 (No. 10 of 1924). By sect. 4 of that Act a High Court of Justice was constituted, consisting of not more than six Judges (namely, a President and five ordinary Judges); and by sect. 5 a Supreme Court of Justice was constituted, consisting of three Judges, of whom the President is to be the Chief Justice of the Irish Free State.

Following this alteration in the judicial system in the Irish Free State, the following Judges retired:—The Lord Chief Justice of Ireland (Right Hon. Thomas Francis Molony), Right Hon. Stephen Ronan (Lord Justice), Right Hon. James O'Connor (Lord Justice), Right Hon. William Houston Dodd, Right Hon. Jonathan Pim, and Right Hon. Arthur Warren Samuels (Justices of the King's Bench Division).

On the 5th June, 1924, the following appointments to the new Courts were announced:—To the Supreme Court: The Attorney-General for the Irish Free State (Hugh Kennedy K.C.) as Chief Justice of the Irish Free State; Right Hon. Charles Andrew O'Connor (formerly Master of the Rolls) and Gerald FitzGibbon K.C. To the High Court: Timothy Sullivan K.C. (President), James Creed Meredith K.C., Right Hon. Thomas Lopdell O'Shaughnessy K.C., The Hon. William E. Wylie K.C., William John Johnston K.C., and James Augustine Murnaghan.

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CASES

DETERMINED BY

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IN

THE IRISH FREE STATE AND IN NORTHERN IRELAND.

1924.

IN RE FRANCES B. TORRENS, A BANKRUPT; EX PARTE JOHN MARSTON'S CARRIAGE WORKS, LTD.

K. B. Div. (*N. I.*) (*Bank.*) 1923.
June 22.

Appeal.
July 30.
Oct. 29.

Bankruptcy—Reputed ownership—Hiring agreement—Option to purchase—Trade custom—Irish Bankrupt and Insolvent Act, 1857 (20 & 21 *Vict. c.* 60), *sect.* 313.

Two hearses and one funeral-coach were in the possession of an undertaker under a hire purchase agreement, which provided that the hirer should pay to the owners a deposit of £515, and the balance by instalments of £125 per quarter, until the full amount of the purchase, £1,015, was paid, when the carriages should become the property of the hirer; but until the full amount was paid they should remain the property of the owners. The owners were to be entitled to take possession should the hirer make default in the performance of any part of the agreement, or become bankrupt or insolvent. The deposit of £515 was paid, but no instalments, and the hirer was adjudicated bankrupt on 10th March, 1923, the carriages being then in her possession. On motion by the owners to have the carriages delivered up to them:

Held by the Court of Appeal, N.I. (Moore L.J. and Andrews L.J.), reversing the decision of Wilson J., that there was such a notorious trade custom of hiring such carriages as excluded the reputation of ownership, and that the owners were entitled to the return of the carriages.

MOTION on behalf of John Marston's Carriage Works, Ltd., for an order that the assignees deliver up to the applicants two hearses and one funeral-coach, their property. It appeared that the bankrupt had become possessed of the vehicles under an

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In re TORRENS.

agreement dated 11th November, 1922, whereby she agreed to hire them from the owners, Messrs. Marston's Carriage Works, Limited, at £125 per quarter, and a premium of £515 within three days of the despatch of the carriages, such premium to become the absolute property of the company in consideration of an option to purchase. The hirer then agreed to keep the carriages in her possession at Londonderry, and not to remove them without the written consent of the company, and to keep them free and exempt from all legal process. The agreement provided that the hirer might within the first twelve months from the date of the agreement purchase the carriages by paying a sum which, together with premium and hire previously paid, equalled £1,015. It was also provided that if the hirer made default in performance of the agreement, or should become bankrupt or insolvent, the company might without any formal notice terminate the hiring, and thereupon be entitled to the immediate return of the carriages; and that the hirer should remain and be a bailee only of the carriages unless and until a purchase was effected.

The deposit of £515 was paid by the bankrupt, but the first instalment was not paid. After the bankrupt had obtained possession of the carriages, the name of her husband, Wallace Torrens, was painted on them.

Pringle K.C. and *Warnock,* for John Marston's Carriage Works, Ltd., in support of the application.

Babington K.C. and *J. G. Dougherty,* for the assignees.

June 22.

WILSON J.:—

I am not satisfied that a sufficiently widespread and well-known practice of giving over the possession and control of these hearses on the hire purchase system has been established. It appears that so far back as 1875 the present applicants tried to establish a similar custom in regard to cars in Birmingham, and they failed on that occasion. Of course, matters have changed tremendously since then, but we come now to the present occasion. Even now I can hardly believe that the public appreciate that a funeral can be stopped on the way to the graveyard, and the hearse taken away by the hirer, if the instalments for the hire are in arrear. It will only be a degree worse when coffins, in the advance of civilization, become the subject-matter of these hire purchase agreements. I am satisfied that these carriage-makers in England do a very large trade in the hire purchase of these and other cars, and they also have done a considerable trade in Ireland in the hire purchase of these cars; and not merely of these hearses and funeral-cars, but also of lorries, char-à-bancs, and Ford cars, and of the sort of

things which are included in this list of fifty-seven cases handed to me. In those cases there appears to be only one instance in which, apart from the Torrens' case, they have allowed out funeral-cars under the hire purchase system in Londonderry. There is also only one case in which they have done it in Belfast. The Belfast case was a hearse, and the Londonderry case was a funeral-car. I do not know the distinction between them.

Mrs. Torrens was allowed by Messrs. Marston's under a hire purchase agreement to be in possession of these cars. They were actually the stock-in-trade of her business, in respect of which she has gone bankrupt. She used these hearses for the purpose of business, with her trade name on them. The ordinary conclusion that she was the owner—the reputed owner—would naturally arise. However, that conclusion of reputed ownership would be dispelled if it were shown that the custom of hiring these funeral-hearses and cars was known or should be imputed to persons who would ordinarily have dealings with Mrs. Torrens in Derry. I have five affidavits from Derry, as against an enormous quantity from the other side, and affidavits from people who actually have hired, to which I do not pay much attention. I have five people in Derry who are creditors, and they say they never heard and knew nothing whatever of the practice of people carrying on funeral undertaking hiring hearses and not owning them. One is the affidavit of the bank manager, who is a man of business who actually in October, 1922—less than a month before the hire purchase agreement—lent the bankrupt £5,500 odd, and believed that money would be used by her to pay for the plant with which to carry on her business.

I think in these circumstances it has not been shown to me that the people in Derry—the general people in Derry who would be likely to deal with Mrs. Torrens—knew there was a practice for people carrying on this undertaking business not to be owners of the cars, but merely to hire them. If such a practice were known, it would deter any sensible man of any class from employing any funeral establishment which did not own the hearses it used in its business. I think the custom has not been sufficiently proved. The decisions on the question of reputed ownership seem to fall into two categories, one where the decision has been against the custom and in favour of reputed ownership, the other where the Court has decreed in favour of the custom and against the assignees. In the latter class of cases it is said that to decide against the true owner there must be deceit, i.e., some contrivance between the true owner and the bankrupt to deceive the creditors into believing that the goods belonged to the bankrupt to enable the bankrupt to get credit. If that were a sufficient ground to decide in favour of the true owner, it would seem to me that once any bona fide practice or custom of letting out chattels on the hire purchase system is proved to exist, whether generally known or not, the case should always be decided in favour of the true owner; and

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In re TORRENS.

Wilson J.

therefore *Waugh's Case* (1) and other similar cases where the question decided was that the custom of hiring furniture in a dwelling-house was not sufficiently general and well known to take the case out of the reputed ownership section should have been decided the other way, for there certainly was no evidence of deceit on the part of the hirer, and a genuine practice of hiring out such furniture undoubtedly existed. I am bound therefore to consider not merely deceit, but whether in the particular case the alleged custom is sufficiently well known to prevent the ordinary creditors from saying they did not know of it. These cases can, if contested, be tried by a jury, but no such application was made to me. If so tried, I think the question to be left to the jury would have to be, "Is the practice of hiring out these hearses and other cars so universally known that persons who would be likely to deal with Mrs. Torrens in the way of business ought not to be allowed to deny that they know it?" and they would have to decide that question on the evidence before them. If there is evidence on both sides of this question, the decision cannot be a mere conclusion of law, nor can it depend on the whim of the particular Court. I have to perform that duty now, and in face of the evidence given by these five witnesses, and taking into consideration all the other evidence, I am not satisfied that the custom has been sufficiently proved, and I answer this question in the negative. If the above is not the proper question of fact to be decided in this and similar cases, I hope the true question may be stated by some higher tribunal.

July 30.

The John Marston's Carriage Works Company, Ltd., appealed to the Court of Appeal (N.I.) (2).

Several affidavits were filed on behalf of the appellants, and five on behalf of the respondents, giving evidence as to the existence of a custom of supplying funeral carriages under hire purchase agreements. The effect of this evidence is stated in the judgments.

Pringle K.C. and *Warnock*, for the appellants:—

The custom is uncontradicted. There is no suggestion in any of the affidavits that there is not such a custom. We respectfully object to the question put by Wilson J., "Is the custom of hiring out these hearses and other cars so universally known that persons who would be likely to deal with Mrs. Torrens in the way of business ought not to be allowed to deny that they know it?" There is no such onus as that of proving universal know-

(1) [1908] 2 I. R. 612.

(2) In the Court of Appeal (N.I.), before MOORE and ANDREWS L.JJ.

ledge. The principle is that which was applied in *Ex parte Watkins, In re Couston* (1); there must be knowledge of facts which are capable of being generally known to those who choose to make inquiry. We submit that Wilson J. misapprehended the decision in *In re Waugh* (2). There is no onus upon the appellants to show knowledge in any particular person under sect. 313 of the Irish Bankrupt and Insolvent Act, 1857: *Ex parte Dorman, In re Lake* (3); *In re Bainbridge, Ex parte Fletcher* (4). In the present case, if we have established a partnership, we are not within the words of sect. 313 at all. There can be no reputation of ownership in the bankrupt, as she was carrying on the business jointly with another person. The nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another, with the consent of the true owner: *Colonial Bank* v. *Whinney* (5). The effect of the custom is to give notice to all those who know it, or to whom the knowledge of it ought to be imputed: *Ex parte Turquand, In re Parker* (6). Before a Court can hold that one man's goods are to be taken to pay another man's debts because of the reputation of ownership of a bankrupt it is essential that the goods should be held and dealt with by the bankrupt in such manner and in such circumstances that the reputation of ownership must arise: *In re William Watson & Co., Ex parte Atkin Brothers* (7). It is not necessary in order to exclude the doctrine of reputed ownership to show that every creditor or any particular creditor or the outside world, who are not creditors, knew anything about particular goods one way or the other: *In re Peel, Ex parte Crossley* (8). Where there is such a known custom as to exclude the general application of the law of reputed ownership, anyone who gives credit to the trader upon the assumption that some of the articles in his possession may belong to him does so at his own risk: *In re Tabor, Ex parte Cork* (9). [They also referred to *Ex parte Reynolds, In re Barnett* (10); *In re Mahon, a Bankrupt* (11).]

Babington K.C. and *J. G. Dougherty,* for the assignees:—

There is no substance of fact in the argument that there was a partnership. A distinction exists between the English and Irish statutes. The English statute is confined to traders, but in Ireland the section applies to any bankrupt, whether he be a trader or not. Messrs. Marston's have to take themselves out of the reputed ownership section. They must show that they were in possession of these goods under a hire purchase agreement, so common and well known that it amounts to a custom. The

(1) 8 Ch. A.C. 520.
(2) [1908] 2 I. R. 612.
(3) 8 Ch. A. C. 51.
(4) 8 Ch. D. 218.
(5) 11 A. C. 426.
(6) 14 Q. B. D. 636.
(7) [1904] 2 K. B. 753.
(8) [1894] 1 I. R. 235.
(9) [1920] 1 K. B. 808.
(10) 15 Q. B. D. 169.
(11) [1918] 2 I. R. 460.

Appeal. (*N. I.*) 1923.

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custom must be proved so conclusively that everyone who deals with the bankrupt must be taken to have notice of it. No evidence has been tendered in the present case by anyone outside the undertaking trade. The custom must necessarily be proved in each case before the Courts will take judicial notice of its existence. [They also referred to *Ex parte Powell, In re Matthews* (1); *Ex parte Lovering, In re Jones* (No. 2) (2); *In re Hill* (3); *In re Goetz, Jonas, & Co.* (4); *In re Peel, Ex parte Crossley* (5).]

October 29.

MOORE L.J. :—

This was an appeal from an order of Wilson J., dated 22nd June, 1923, whereby it was declared that one new best finish funeral hearse, No. 12699; one new improved light hearse, No. 12785; and one new funeral coach, No. 12777, were declared to be in the order and disposition of the bankrupt as reputed owner within the meaning of sect. 313 of the Irish Bankrupt and Insolvent Act, 1857, and same were directed to be sold for the benefit of the creditors under the bankruptcy.

Apart from one issue, the facts were not generally in dispute. It appeared that on the 11th November, 1922, the bankrupt entered into an agreement in writing with John Marston's Carriage Works, Ltd., of 21 Bradford Street, Birmingham, carriage builders, under which she subsequently obtained possession of the chattels the subject-matter of this appeal. The agreement was a hiring agreement; £515 was to be paid at once, and the hire was to continue at the rate of £125 per quarter. The agreement contained an option of purchase at a total sum, giving credit for any hire previously paid, amounting to £1,015. It is unnecessary to set out in more detail the other provisions of the agreement, because it is quite plain that until such purchase was completed the property in the chattels never passed to the bankrupt. What was alleged to be a material fact in the case was that after the bankrupt had obtained possession of the hearses the name of her husband, Wallace Torrens, was painted on them.

Mrs. Torrens was adjudicated bankrupt on 10th March, 1923. The official assignee, on behalf of the creditors, claimed the hearses and mourning coach as being within her order and disposition. The question for us is whether this claim in the circumstances of the case succeeds. The following is the law as laid down in *Ex parte Watkins* (6), and quoted with approval by Walker C. in *In re Peel, Ex parte Crossley* (5). [His Lordship then read the passage at pp. 242–3.]

We therefore have to decide whether the creditors from general knowledge were entitled without further inquiry to

(1) 1 Ch. D. 501.
(2) 9 Ch. A. C. 621.
(3) 1 Ch. D. 503 n.
(4) [1898] 1 Q. B. 787.
(5) [1894] 1 I. R. 235, at p. 242.
(6) L. R. 8 Ch. App. 520.

assume that the chattels were the absolute property of the bankrupt. On the argument we came to the conclusion that the creditors were not so entitled without some inquiry. We therefore, as it was on the eve of the Long Vacation, made a speaking direction to the assignee to release the goods, and intimated our intention to give our considered judgments this term, as the matter appears to be of some public interest. We have had a considerable amount of evidence, going to show that, in dealing with expensive articles in the trade such as hearses, it is a very general custom to supply them under hire purchase agreements, such as that in the present case. Mr. Marston, one of the directors of the appellant firm, has given us a list on oath, with full particulars of no less than fifty-seven funeral cars and hearses supplied by his company to customers in Ireland between November 23rd, 1912, and March 28th, 1923—all under hire purchase agreements. He says the system is general in the trade. Testimony to the same effect is given by several other witnesses. It is also established in evidence that the Official Recorder in Bankruptcy at Newcastle recognized the existence of this trade custom in an English bankruptcy in the present year, and released two hearses in circumstances analogous to the present.

In *Crossley's Case* (1), above referred to, FitzGibbon L.J., in discussing hire purchase agreements, says that the principle is "recognized as one of growing application, and it must develop with the development of the manifold arrangements which commercial enterprise produces." That was nearly thirty years ago, and it is common knowledge that the principles of hire purchase agreements, as the Lord Justice foresaw, have been widely availed of in an ever-increasing degree. Walker C., in the same case, gave a list of subjects to which the doctrine had been applied—whiskey in bonded store in name of bankrupt, pianos sold on three years' system, sewing machines, furniture bought for an hotel, portable steam engines used by timber merchants, and printing machines. By that judgment an Otto gas engine was added to the list. Since then the list has been further extended, and in this country it now includes a race horse leased for three years: *Re Mahon* (2). From our own knowledge of affairs the hire purchase system is at present constantly in use with respect to motor cars, bicycles, and gramophones. I think on the evidence here the custom is sufficiently notorious to take the hearses and funeral car out of the order and disposition clause.

I did think that the fact that the name Wallace Torrens was painted on the hearses in the present case did distinguish it from *Crossley's Case* (1), where the label with Crossley's name on it remained on the engine. But on consideration I do not think the distinction is material; once it is found that the custom of hiring is notorious, whose name, if any, is on the vehicle cannot affect the issue. It may be urged that the development on the

(1) [1894] 1 I. R. 235. (2) [1918] 2 I. R. 460.

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lines forecasted by FitzGibbon L.J. will ultimately destroy the operation of the order and disposition clause. This does not much impress me. Unless the doctrine of holding out is pushed to extremity, I know of no rule of law or equity apart from statute which would justify the seizing of A's goods to pay the creditors of B.

I am of opinion that the claimants have proved their case, and that the appeal should be allowed and the order of Wilson J. discharged with costs in each Court, to be paid by the assignees.

ANDREWS L.J.:—

The admitted facts of this case establish conclusively that at the date of the adjudication the two funeral-hearses and the funeral-coach which form the subject-matter of the present application were the property of the appellants, John Marston's Carriage Works, Ltd. They are, however, claimed by the assignees of the bankrupt under sect. 313 of the Irish Bankrupt and Insolvent Act, 1857, better known as the order and disposition or reputed ownership clause, as they were admittedly in the possession of the bankrupt at the date of the adjudication. The appellants' answer to this claim is that the reputation of ownership in the bankrupt which it is necessary for the assignees to establish is absolutely excluded by the existence of a well-known custom in the undertaker's business of acquiring hearses and funeral coaches under hire purchase agreements.

The object of sect. 313 is clear. It is directed against a false credit which a person may obtain in the carrying on of his business by the visible possession of property of which he is not the true owner. When goods owned by one person are, with his consent and permission, allowed to remain in the possession, order, or disposition of another person, parties dealing with such latter person sometimes assume that such goods are the property of that other person, and as a consequence they give him a credit in their business relations with him which they would not otherwise do. When such person becomes bankrupt some one must suffer, and the policy of the law as embodied in this section is that if the circumstances reasonably warranted the assumption of ownership the loss should fall upon the true owner, who has permitted the situation to arise, rather than on the innocent creditors of the bankrupt. The law accordingly in such cases transfers to the assignees for the benefit of the creditors the goods, which never, in fact, belonged to the bankrupt.

It is a section so far-reaching in its operation and effect that it is not to be wondered at that the Courts have repeatedly recognized that the doctrine to which it gives expression has its limitations. If too widely interpreted the attempt to bring justice to the creditors would result in the occasion of a greater injustice to the true owner. One such limitation is that the reputation of ownership is rebutted by the notoriety that goods

of the character concerned are by custom, or rather the usage of trade, repeatedly to be found in the possession of persons who are not the true owners. Thus the custom of hotel-keepers to hire furniture was recognized in *Ex parte Powell, In re Matthews* (1), and *Ex parte Turquand, In re Parker* (2), and several other cases. The customs of coach-builders to have the carriages of private individuals on their premises for sale, of coal merchants to use hired barges, and of tradesmen to use hired horses and carts, and many other trade usages have from time to time received judicial recognition, and the wisdom and reasonableness of such limitation on the doctrine of reputed ownership cannot be questioned, for when the custom exists and is notorious anyone who gives credit to a trader on the assumption that the goods belong to him merely because they are in his possession takes his chance, and does it at his own risk.

There are two ways of proving the existence of a custom such as that contended for in the present case. The first is by reference to other cases in which the custom has been held to be established, for mercantile custom may be so frequently proved that it becomes part of the law merchant of which Courts will take judicial notice. The second is by adducing satisfactory evidence in the particular case. Both methods are adopted by the appellants in this case. It is true that no reported case has been or can be cited in which the existence of the custom of acquiring hearses and funeral-coaches under hire purchase agreements can be said to have been established by judicial authority; but a letter is produced and duly verified from the Official Receiver in Bankruptcy at Newcastle-on-Tyne in which, in another case in which the appellants were interested, he admitted the existence of "a well-known custom for hearses to be supplied under hire purchase agreements." In his affidavit the appellant, Charles B. Marston, further states that during the past number of years a number of persons to whom his firm supplied vehicles became bankrupt, and in every case the Official Receiver handed over the vehicles to his firm on production of the agreement, and that never at any time has the question of the custom failed to be well recognized and established. These statements, though helpful, are by no means conclusive, as they do not involve any judicial determination, and they relate to England, where a custom may possibly exist and be well known though it may have no existence in this country. The appellants must therefore really rely, in my opinion, on the second method of proof. What is the evidence produced so far as it relates to Ireland? Mr. Marston proves that for thirty years at least his firm has supplied hearses and other vehicles in Ireland on the hire purchase system, and that this system is adopted by several other firms. He further exhibits a list of names of upwards of fifty persons residing in Ireland to whom his firm have supplied hearses and funeral-cars on the hire purchase system since the year 1912, one

(1) 1 Ch. D. 501. (2) 14 Q. B. D. 636.

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of such persons, in addition to the bankrupt, residing in Londonderry. This represents at least ninety per cent. of the business done by his firm in Ireland. His evidence as to the existence and notoriety of the custom in the trade of supplying vehicles on the hire purchase system is supported by the testimony of representatives of other firms of coach- and carriage-builders, shroud-makers, and funeral undertakers, all of whom depose to the well-known and established character of the alleged custom. The evidence of some is apparently of general application, whilst that of others is specially directed to Ireland. On the other hand, we have the affidavits of four creditors and of the manager of the bank with which the bankrupt had her account, who state that they never knew or heard of the custom. It is important to note, however, that of the five deponents referred to, only one, Alexander Noble, who was a trade rival of the bankrupt's in Londonderry, has had any connexion with or knowledge of the business of an undertaker, or of the customs, practices, and habits incident to same. Their evidence does not shake my confidence in the conclusion at which I have arrived, namely, that the alleged custom exists in Ireland as well as in England, and that a very large proportion of the sales of funeral-hearses and carriages are effected in this manner. I am also satisfied that the custom is one which is well known in the trade; but, accepting, as I wish to do, the veracity of the five witnesses referred to, I am unable to say that it is by any means universally known to the public.

It is necessary, therefore, to consider the degree of notoriety of a custom which the law demands in order to exclude the operation of the doctrine of reputed ownership. Many cases were cited to us in argument, and it must be admitted that judicial dicta on the subject have not always been characterized by consistency. Mellish L.J. stated in *In re Hill* (1) that the custom must be shown to be known not only to persons in the same trade, but to others who were likely to be creditors; and in *Ex parte Powell, In re Matthews* (2), the same learned Judge said that the custom "must be proved to have existed so long and to have been so extensively acted upon that the ordinary creditors of the debtor in his trade may be reasonably presumed to have known it." In *Goetz, Jonas, & Co., Ex parte The Trustee* (3), A. L. Smith L.J. thought that the custom must be one which is known in business generally, and not merely to persons dealing in a particular market. Holmes L.J., in *In re Waugh* (4), considered that the custom must be so well established as to lead to the reasonable presumption that it was known by the bankrupt's creditors. But the general trend of recent judicial opinion in both England and Ireland—see *In re Tabor, Ex parte Cork* (5), and *In re Mahon* (6)—is a reaffirmation of the principles so clearly enunciated by the Earl of Selborne L.C. in

(1) 1 Ch. D., at p. 504n.
(2) 1 Ch. D., at p. 508
(3) [1898] 1 Q.B. 787.
(4) [1908] 2 I.R. 612, at p. 621.
(5) [1920] 1 K.B. 808.
(6) [1918] 2 I.R. 460.

Ex parte Watkins, In re Couston (1), and subsequently in *Ex parte Turquand, In re Parker* (2); and I respectfully adopt them as my own. "It is not at all necessary," he says, "in order to exclude the doctrine of reputed ownership, to show that every creditor or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession." In further development of this principle he emphasises, not once, but several times, that it is the duty of persons having business dealings with others, before claiming the benefit of a reputation arising from possession, to take the trouble to inquire into the facts and acquire some knowledge as regards the ownership. It is quite obvious that Lord Selborne considered that for the application or exclusion of the principle of reputed ownership one need not have regard to the actual state of knowledge of all the world, but rather to the knowledge, either actual or imputed, of those who, as he says, "knew the situation of the goods." This expression obviously means, as Pim J. says in *In re Mahon* (3), those who have concerned or interested themselves in the matter, or have made themselves acquainted with the nature and customs of the particular occupation; for it would be unreasonable, if not absurd, to say that any particular outside creditor who did not know or take the trouble to inquire into the customs of his debtor's business could by arriving at a false conclusion on insufficient knowledge make such debtor a "reputed owner." Reputation of ownership is not to be determined by the chance and worthless opinions of the uninterested and ignorant, but rather by the reasoning minds of those who are really concerned, or of those who are possessed of at least such a degree of knowledge of the material facts as gives their opinion some value. Finally, we must remember the words of Vaughan-Williams L.J. in delivering the judgment of a very strong Court in *In re Watson & Co., Ex parte Atkin Brothers* (4), where he said: "In our opinion it is essential, before a Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership 'must arise,'" not "may arise."

Applying these principles to the present case, I am clearly of opinion that not only the existence, but also the notoriety of the custom relied upon has been sufficiently proved to exclude the operation of the doctrine of reputed ownership. The evidence is at least as convincing, and in some respects more conclusive, than that upon which the Court of Appeal acted in *Crossley's Case* (5). The order of Wilson J. must be reversed with costs.

Solicitor for the appellants: *James C. Barr.*
Solicitors for the assignees: *E. & R. D. Bates.*

J. M'C.

(1) L. R. 8 Ch. Ap. 520. (2) 14 Q. B. D. 636. (3) [1918] 2 I. R., at p. 464.

K. B. Div.
(I. F. S.)
1923.
Nov. 26.

HOGAN *v.* HOGAN (1).

(1923. No. 17341.)

Practice — Security for costs — Application "grounded upon affidavit" — Order 29, rule 1.

An application for security for costs under Order 29, rule 1, must be by summons grounded upon affidavit; and accordingly, when no mention of an affidavit is made in the summons, and no copy is served along with it, the application must be refused.

SUMMONS for security for costs.

In an action brought by a plaintiff resident in England for £144 13s. 3d. for work and labour done, goods sold and delivered, money paid, &c., the defendant applied by summons, dated 2nd November, 1923, under Order 29, rule 1, for an order compelling the plaintiff to give security for costs. This summons, which was served on November 7th, did not refer to any affidavit grounding the application, nor was any copy affidavit served along with it. An affidavit was filed by the defendant on November 2nd, and served on plaintiff on November 10th, but it was defective; and accordingly another affidavit was filed and served on November 12th.

Charles Murphy, for the plaintiff:—

As a preliminary objection, I submit that this application cannot be granted. No reference is made in the summons to any affidavit, nor was any affidavit served along with it. The rule expressly provides that the summons must be grounded on affidavit. The practice applicable to motions on notice is fully set out in the notes to Order 38, rule 1, Wylie, p. 568.

[PIM J.: Does the practice as there stated also govern summonses?]

I submit it does.

(1) Before PIM J.

Conor Maguire, for the defendant:—

The mere statement in the rule that the application is to be grounded on affidavit does not necessitate any reference to the affidavit in the summons, nor is service of a copy along with the summons essential. The first affidavit was sworn before the summons was issued, and was served two days before it came on for hearing, when the application was adjourned.

[*Charles Murphy*: But my right to make this preliminary objection was expressly preserved.]

PIM J.:—

It is the universal practice of the Courts of common law that the affidavit should be mentioned in a notice of motion and a copy served with it; and I see no reason why the same practice should not apply to a summons when it is provided that the summons is to be grounded on an affidavit. I have no option but to refuse the application with costs, leaving Mr. Maguire, if so advised, to serve a new summons.

Solicitors for the plaintiff: *Barrington & Son.*
Solicitor for the defendant: *Sean O hUadhaigh.*

T. C. T.

K. B. Div.
(I. F. S.)
1923.
Dec. 3.

HOGAN *v.* HOGAN, No. 2 (1).
(1923. No. 17341.)

Practice—Security for costs—Partial admission of liability—Discretion of the Court.

In an action brought by a plaintiff resident out of the jurisdiction, the defendant, in moving for security for costs, filed an affidavit in which he stated he was prepared to pay £80 of the amount claimed. He also filed a defence, paying £80 into Court, with a denial of liability.

Held, that in the circumstances the plaintiff should not be ordered to give security for costs.

Furnell v. *Stackpoole* (Milward, 271) and *M'Neany* v. *Maguire* ([1923] 2 I.R. 43) referred to.

SUMMONS for security for costs.

The plaintiff, who resided out of the jurisdiction, sued the defendant for £144 13s. 3d., money alleged to be due for work and labour done, goods sold and delivered, and money paid. The defendant applied for security for costs, but the application was dismissed on a preliminary objection: see *Hogan* v. *Hogan* (2). He now renewed the application for a new summons, grounded on an affidavit, in which he purported to show that he had a bona fide defence, but at the same time stated his willingness to pay £80 of the sum claimed, which sum he was about to lodge in Court with his defence. He subsequently delivered his defence, bringing into Court £80, with a denial of liability.

Charles Murphy, for the plaintiff.

Conor Maguire, for the defendant.

DODD J.:—

Exercising my discretion, it is clear I should not make an order for security for costs in this case. The mere fact of the defendant admitting a small portion of the demand of the plaintiff would not debar me in a fit case from making such an order. But if I made an order here, the security would probably be fixed in the office at £40 or £50. The defendant admits the plaintiff is entitled to £80, which he proposes to lodge in Court. He can apply for an order that that sum be not paid out till the issue be determined. An order now is unnecessary, and would be futile. I refuse the motion with costs. As to the general principle underlying these orders, I refer to my decision in *M'Neany* v. *Maguire* (3), and to the judgment of Dr. Radcliff in the case of *Furnell* v. *Stackpoole* (4) in Milward, cited in that decision.

Solicitors for the plaintiff: *Barrington & Son.*
Solicitor for the defendant: *Sean O hUadhaigh.*

T. C. T.

(1) Before DODD J.
(2) Ante, p. 13.
(3) [1923] 2 I.R. 43.
(4) Mil. R. 271.

HIS MAJESTY'S POSTMASTER-GENERAL, APPLICANT AND APPELLANT; DOWN COUNTY COUNCIL, RESPONDENTS (1).

Appeal. (*N. I.*) 1923.

June 20.

Malicious injury—Damage to telephone wires—Necessary repairs—Cost of labour and establishment charges—Compensation—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 135; *Local Government (Ireland) Act,* 1898 (61 & 62 *Vict. c.* 37), *sect.* 5.

Telegraph and telephone wires, the property of the Postmaster-General, situate in the division of Downpatrick, in the County of Down, were maliciously damaged. The necessary repair work was executed by four employees of the applicant.

Held, that the Postmaster-General was entitled to be paid compensation in respect of the amount of men's wages, time of salaried officer, and establishment charges.

CASE STATED for the opinion of His Majesty's Court of Appeal in Northern Ireland by Andrews L.J. from the County of Down Spring Assizes.

The case stated set out the facts as follows:—

This was a claim by the Postmaster-General for compensation for loss sustained by him by reason of the malicious injury and destruction of certain telephone wires on 17th and 18th May, 1922. The case was heard by me at the Downpatrick Assizes in March, 1923, on appeal by the County Council from the decree of the County Court Judge for £15 17s. 2d.

The applicant's claim represented the expense alleged to have been incurred in executing the necessary repair work to the wires, including certain temporary repairs. The repair work was executed by four employees of the applicant. Of these men, one, Matthew Wall, the foreman, and a second named Kernohan, were on the temporary staff, whilst the remaining two men, Guiney and Huet, though sometimes referred to at the hearing as temporary hands, were more correctly described as being on the probationary staff, and had been in the applicant's continuous employment for slightly more than one year before May, 1922. It was admitted that none of the four men had been specially employed by the applicant as an extra hand for the repair of these damaged wires.

All of these men would have been paid the same wages as they in fact received even though no damage had been done to these wires; and the applicant admittedly did not incur any additional expense in having the work executed except for the materials supplied and allowances for the men's lodgings. At the same

(1) In the Court of Appeal (N.I.), before SIR DENIS HENRY, Bart., C.J., and MOORE L.J.

Appeal. (*N. I.*) 1923.

POSTMASTER-GENERAL v. DOWN CO. COUNCIL.

time it was proved to my satisfaction that if the men had not been engaged in repairing these damaged lines they would probably have been employed in the erection of new telephone lines, from which the applicant would have derived revenue. The technical character of the work of repairing telephone wires made it undesirable, if not absolutely impracticable, to employ purely temporary or extra hands for the work. It was also admitted on behalf of the applicant that if the work had been temporarily slack, and there had been nothing for these men to do, they would have been paid the same wages as they were paid when executing these repairs. All four men are still in the employment of the applicant, though the malicious destruction of telephone wires, which was a frequent occurrence about the date of the injury complained of in this case, has for a considerable time past practically, if not entirely, ceased. It was not suggested that the applicant's staff had been reduced since conditions in the country had improved; and I was of opinion on the evidence that all these four men, or others in their place, were a necessary part of the applicant's staff for the new work and ordinary repair work in normal times.

I refer to particulars of the claim, amounting to £17 0s. 5d. The appellants admitted liability for the sums claimed for stores, freight, and lodging money, amounting in all to £4 5s. 2½d., less £1 value of recovered stores, or a net sum of £3 5s. 2½d. They disputed the items of £12 for labour of the four men, 2s. 6d. time of salaried officer, and £1 12s. 9d. establishment charges.

The County Court Judge made a decree for £15 17s. 2d., said sum representing approximately the amount of applicant's claim, less the amount of establishment charges.

Mr. Davison appeared for the applicant. Mr. J. M. Whitaker K.C. and Mr. Hume appeared for the County Council. Their contentions sufficiently appear from the facts already stated.

I was of opinion, on the facts proved in this case, that the applicant was not entitled to recover any of the disputed items; and I accordingly reduced the decree of the County Court Judge from the sum of £15 17s. 2d. to the sum of £3 5s. 2½d. (say £3 5s. 3d.).

I clearly stated, however, that I did not hold that under no circumstances could the applicant recover compensation for cost of labour in cases of this character, but that in my opinion to entitle the applicant to recover any such sum it would be necessary for him to prove something which was not proved in this case, namely, that extra men had been employed by the applicant for the purpose of executing this repair work, and possibly other repair work of a like character, or that they had been employed for the purpose of doing the ordinary work of the permanent or probationary staff, whilst the latter carried out this special repair work, as in either of such cases there would be evidence of loss to the applicant for which, in my opinion, he

ought to be compensated. No such evidence, however, was given in this case.

Mr. Davison, for the applicant, applied for a case stated; and as I am personally aware that there has been much divergence of opinion amongst the Judges of Assize and Judges of the County Courts in these telephone cases and other cases, such as claims by the Commissioners of Customs and Excise, involving the same points, I agreed to state this case, though my decision was based on the special facts proved rather than on any general principle of law.

The question for the opinion of the Court is whether on the facts stated any sum should be allowed for:—(*a*) Labour of four men, for which £12 is claimed, but for which the proper figure should be £9 10s.; (*b*) time of salaried officer, 2s. 6d.; (*c*) establishment charges at ten per cent., for which £1 12s. 9d. is claimed, but for which the proper figure should be £1 7s. 9d. [Total, £11 0s. 3d.]

If the Court be of opinion that my decision is correct, there will be a decree for £3 5s. 3d., with £3 10s. 3d. costs to the applicant in the County Court, less £5 7s. 3d. costs to the County Council, of the appeal. If any of the three sums of £9 10s. 0d., 2s. 6d., and £1 12s. 9d., in the last paragraph hereof mentioned, be allowed, a decree should be given for any such sum or sums, in addition to the £3 5s. 3d. mentioned; the costs of appeal in such event, and the costs of the case stated in any event, to be in the discretion of the Court of Appeal.

Murphy K.C. and *J. C. Davison,* for the Postmaster-General:—

The only proper principle is that the compensation awarded should be for the actual cost of repairing the damaged work. The damage does not cease to be a subject of compensation merely because extra hands have not been employed. It is impossible to segregate the work of the men employed in the construction and repair of telegraph and telephone wires. The loss is a concrete figure, although the method of estimating it may be somewhat difficult. We submit it is to be measured by the time occupied and materials used in repairing the damage. Before the wires were repaired the Postmaster-General could have recovered for estimated damage and also consequential damage. We submit that the principle which the learned Lord Justice applied is unsound.

Williamson K.C. and *Hume,* for the Down County Council:—

The Postmaster-General has sustained no damage except that allowed by the learned Lord Justice, and his only claim should be for board and lodging.

Appeal.
(N. I.)
1923.

POSTMASTER-GENERAL
v.
DOWN
CO. COUNCIL.

SIR DENIS HENRY, Bart., C.J.:—

This was a case stated by Andrews L.J. in respect of an application by the Postmaster-General by reason of malicious injury to and destruction of certain telephone wires on the 17th and 18th May, 1922. The case was heard at the Downpatrick Assizes on appeal by the County Council from a decree of the County Court Judge for £15 17s. 2d.

[The Lord Chief Justice read the case stated, and proceeded:—]

The case was argued before us on these facts and findings, and we are of opinion that the Postmaster-General is entitled to succeed to the extent of £14 5s. 6d., being the admitted total amount—£3 5s. 3d. and £11 0s. 3d.—disallowed by Andrews L.J. If a person who has sustained injury by a malicious act does not choose to reinstate the property, the subject-matter of the injury, it does not affect his right to compensation; and if the Postmaster-General had applied before reinstatement he would clearly have been entitled to compensation. It is also clear that on the findings the Postmaster-General, on payment of the wages to the men, had the right to a certain number of days' work from the men, and owing to the malicious acts complained of he had to utilize a portion of the time to repair this damage. Had this damage not been done, he could have utilized these men's time in any way he wished, and no person had any right to say how he was to do so.

We think that owing to these acts he had to pay a certain sum in wages and charges which were lost to him, and this, in our opinion, is the subject of compensation.

We accordingly find that the sum of £14 5s. 6d. is payable to the Postmaster-General by way of compensation, and we are of opinion that he is entitled to the costs of the case stated and of the appeal.

MOORE L.J.: I concur with the Lord Chief Justice.

Solicitor for the applicant and appellant: *H. C. Weir.*
Solicitors for the respondents: *Martin & Henderson.*

J. M'C.

IN RE WARD, INFANTS (1).

(1923. No. 47.)

K. B. Div. (*N. I.*) 1923.

May 5.
May 9.

Appeal. (*N.I.*) 1923.

May 16, 17.
June 1.

Infants — Custody — Habeas corpus — Religious education — Dead father's express direction—Welfare of children—Change of religious education—Separation of family.

In 1911 M. and E. were married according to the rites of the Roman Catholic Church. E. had been a Presbyterian, but shortly before her marriage became a Roman Catholic. There were three children of the marriage, daughters. In 1920 M. fell into habits of intemperance, and ceased to provide a home for E. and his children. Accordingly E. brought the children with her to her father's house, who thereafter supported them all, and M. went to live with his brother. At the same time the eldest girl was taken from a Roman Catholic school and was sent to a Presbyterian school, which she continued to attend for nearly two years. In July, 1920, M. made his will, whereby he directed that his children should be brought up in the Roman Catholic faith. After her husband's death, in October, 1920, the wife became once more a Presbyterian, and died in March, 1923, a member of that Church. The children, from the date of their mother's death, continued to reside with their maternal grandfather and grandmother, who brought them up as Presbyterians. At the time of the application for a writ of habeas corpus the children were respectively aged eleven, six, and four years. The Judges of the King's Bench Division (Sir Denis Henry C.J. and Brown J.) having interviewed the eldest girl, were satisfied that she had acquired fixed Presbyterian convictions.

Held by the Court of Appeal, affirming the judgment of the King's Bench Division, that it would not be for the benefit of the eldest child to hand her over to her paternal relatives. *Held* also by the Court of Appeal, reversing the judgment of the King's Bench Division, that as regards the two younger children the appeal should be allowed, on the ground that it was for the welfare of all the children that they should be brought up together in the custody of their maternal relatives.

Elizabeth Ward, formerly Laverty, the mother of the infants, was married on the 28th February, 1911, to Matthew Joseph Ward. She was the daughter of Alexander Laverty and Mary Laverty, and until a few months before her marriage had been a Presbyterian, but shortly before that event she became a Roman Catholic. Her husband, Matthew Joseph Ward, had always been a Roman Catholic, and continued so until his death, which took place in October, 1920. There were three children of the marriage—Mary, aged eleven; Lila, aged six; and Peggy, aged four, at the date of the application. Some time before the death of Patrick Joseph Ward his wife, Elizabeth Ward, ceased to reside with him, and went to live with her father and mother,

(1) In the King's Bench Division (N.I.), before Sir DENIS HENRY, Bart., C.J., and BROWN J.; and in the Court of Appeal (N.I.), before MOORE and ANDREWS L.JJ.

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In re WARD.

taking the three children with her. During the lifetime of Matthew Ward the children were brought up as Roman Catholics, but the eldest child, Mary, after attaining the age of eight, attended a Protestant school during the lifetime of her father. Ward by his will directed that his children should be brought up Roman Catholics. Elizabeth Ward, the wife of Patrick Ward, survived her husband, and died on 23rd March, 1923. From the time the wife and children went to reside with Alexander and Margaret Laverty there was no evidence of their having attended at a Roman Catholic church or school. Mrs. Elizabeth Ward died a Presbyterian, and was attended on her death-bed by a Presbyterian clergyman. From June, 1920, the three children remained in the house of their maternal grand-parents, and the eldest child, Mary, attended the Presbyterian church for a period of from eighteen months to two years. The clergyman of the Presbyterian church where she attended gave evidence that Mary had acquired clear Presbyterian views. She had also attended, during that period at least, a Protestant school.

On the 24th April, 1923, Brigid Ward, the paternal grand-aunt of the infants, Mary, Lila, and Elizabeth Ward, obtained a conditional order for a writ of habeas corpus against Alexander Laverty and Margaret Laverty, the maternal grand-parents of the children, in order to obtain the custody of the infants.

On the 5th May, 1923, an application was made to Sir Denis Henry, Bart., C.J., and Brown J. in the King's Bench Division to make the order absolute. Sir Denis Henry C.J. and Brown J. had an interview with the eldest child, Mary, and were satisfied that she had acquired fixed Presbyterian views.

The Rev. John Pollock was examined on behalf of the respondents, and stated that he was the minister of St. Enoch's Presbyterian Church, Belfast, and that Mr. Laverty and his wife and family attended his services, as also did the little girl, Mary Ward. She had been coming fairly regularly for the past eighteen months, and, he understood, had been attending the Antrim Road Baptist National School. As a result of conversations he had had with her, he was of opinion that she had decided convictions in favour of the Church she was now attending. He knew the mother of the children, and officiated at her funeral; she died a Presbyterian.

T. J. Campbell K.C. and *M'Corry,* for the applicant, Brigid Ward, a paternal grand-aunt of the infants:—

The father of the children was a Roman Catholic, and the respondents, who have custody of the children, are Presbyterians. The children were baptized Roman Catholics, and were brought up in the Roman Catholic faith from their birth by their father and mother. Their father by his will directed that his "three children should be brought up in the Roman Catholic faith, and of which they are at present members." The children are not

being brought up as Roman Catholics. The dead father's last wishes should prevail, having regard to the tender ages of the children and the absence of evidence that he had waived or forfeited his right to control their education. We rely on *Hawksworth* v. *Hawksworth* (1), where it was held that the religion in which an infant should be brought up is that of its father. The rule of the Court is, unless in exceptional cases, to have sacred regard to the religion of the father in dealing with the child. This is found in a line of cases, including *Andrews* v. *Salt* (2), *In re Agar-Ellis* (3), *In re Scanlan, Infants* (4). In the case of the eldest child, in view of the history of her religious training, the Court should not allow the wishes of the father to be disregarded on the plea of her settled convictions. On the question of the welfare of the infants, the balance is in favour of the paternal relatives. In *In re Newton* (5) Lindley L.J. in his judgment, at p. 747, referred with approval to the dictum of James L.J. in *In re Agar-Ellis* (3): "That the law of this country is based on the theory that the responsibility should be with the father."

[They also referred to: *F.* v. *F.* (6); *In re Goldsworthy* (7); *In re Hyndman, Infants* (8); *In re Harriet O'Hara, an Infant* (9); *In re Grey, Infants* (10); *R.* (*M'Conway and Byrne*) v. *Guardians of the Poor of the Belfast Union* (11); *In re Connor, an Infant* (12).]

E. S. Murphy K.C. and *Lowry,* for the respondents:—

The object of the application is to deprive the maternal grand-parents of the custody of these three children. These infants are living in a happy home, and they have beyond controversy a real affection for their grand-parents. An attempt is made nearly three years after the father's death to remove the children from their grand-parents. The father was dismissed from his employment owing to his intemperance, and from 1912 he gave no support to his wife or child. Before the husband's death his wife and children had to leave his house. It had been said that the paramount consideration is the wish of the father; but we suggest that the paramount consideration is the welfare of the children: *In re W. W.* v. *M.* (13). Was it to be suggested that it would be for the welfare of the children brought up in a happy home that they should be torn from that happy home and taken away? In *In re Story, Infants* (14) it was held that a child of eleven might have settled convictions. It would not be for the happiness of these children to remove them from their

(1) L.R. 6 Ch. A.C. 539.
(2) 8 Ch. A.C. 622.
(3) L.R. 10 Ch. D. 49.
(4) L.R. 40 Ch. D. 200.
(5) [1896] 1 Ch. D. 740.
(6) [1902] 1 Ch. D. 688.
(7) 2 Q.B.D. 75.
(8) 39 I.L.T.R. 191.
(9) [1900] 2 I.R. 232.
(10) [1902] 2 I.R. 684.
(11) [1908] 2 I.R. 343.
(12) [1919] 1 I.R. 361.
(13) [1907] 2 Ch. D. 557.
(14) [1916] 2 I.R. 328.

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present home. We urge upon the Court the desirability of seeing the eldest child before coming to any conclusion. We submit that the Court ought not to break up this little family. The eldest child has acquired certain settled religious views. We rely on *In re Goldsworthy* (1), and especially on the words used by Lord Coleridge C.J., where he states in his judgment at p. 84 that "gross and habitual intemperance on the part of the father cannot but be seriously prejudicial to the moral safety and welfare of the child." The relatives are in no stronger position than the father would have occupied. No Court should come to the conclusion that it is for the interests of the children to have them removed from a happy home and given in charge to relatives who took no strong interest in them.

May 9.

SIR DENIS HENRY, Bart., C.J., delivered the judgment of the King's Bench Division, as follows:—

This is an application on behalf of Brigid Ward for a writ of habeas corpus directed to Alexander Laverty and Margaret Laverty, his wife, who reside at 3 Allworthy Avenue, Belfast, directing them to produce the bodies of three children, Mary Ward, Lila Ward, and Peggy Ward, for the purpose of being delivered into her custody.

These children, who are aged respectively, Mary eleven, Lila six, and Peggy four, are the lawful daughters of Matthew Joseph Ward, late of Gargory, in the County of Down, and Elizabeth Ward, formerly Laverty, his wife.

Elizabeth Ward was the daughter of Alexander Laverty and Margaret Laverty, and she was married on the 28th February, 1911. Up to the time of her marriage she was a Presbyterian, but some short time before it she was baptized in the Passionist Church, Ardoyne, according to the rite of the Roman Catholic Church, and was received as a member of that Church.

After the marriage, and up to the death of her husband, which took place on the 27th October, 1920, she seems to have attended Mass at St. Patrick's Catholic Church, Donegall Street; and it is sworn by the Rev. Bernard Laverty that he frequently visited her as a Catholic, and he denies that she only conformed to that faith to the extent required for marriage to a Catholic. The husband always remained a Catholic. The marriage was an unhappy one, but it is not necessary for us to go into this matter, inasmuch as this is not an application by a living father. Both parents are dead, and no suggestion is made against Brigid Ward and the other paternal relatives associated with her in this application, and they are the only people we have at present to consider. During the lifetime of Matthew Ward the children, so far as was possible at their age, were brought up Roman Catholics; Mary for some considerable time attended the Crumlin Road Convent School, and she made her first Communion as a Roman Catholic. She did attend the Antrim Road National

(1) 2 Q. B. D. 75.

School after attaining the age of eight, which is a Protestant school, during the lifetime of her father.

The mother of these children and the children themselves seem to have gone to reside with Alexander Laverty in June, 1920, and since that date he maintained them, and they lived in his house. Elizabeth died on the 23rd March, 1923, and this application was made shortly after her death. Matthew Joseph Ward, the father of the infants, made his last will on the 22nd July, 1920, and bequeathed all his property, worth about £2,000, in the events that have happened to his three children in equal shares. He appointed his wife Elizabeth trustee, and directed that his children should be brought up in the Roman Catholic faith. From the time the wife and children went to reside with Alexander Laverty, in June, 1920, there is no trace of the attendance of the children at a Roman Catholic church or school; and Mrs. Elizabeth Ward is proved to have died a Presbyterian, and to have been attended on her death-bed by the Rev. Mr. Pollock, the minister of St. Enoch's Church.

No application of any kind was made in connexion with the children during the lifetime of Elizabeth Ward by any of the paternal relatives, and it is alleged by Mr. Joseph Ward, paternal uncle of the children, that he was advised that, owing to their tender years, it would have been useless to try and get them out of the custody of their mother. The result was that the three children—Mary, born on the 10th January, 1912, and Lila and Peggy, aged six and four respectively—remained with their grand-parents. During nearly two years at least Mary Ward attended the St. Enoch's Presbyterian Church, she went to the Baptist National School, Antrim Road, and she was seen from time to time by Rev. John Pollock, of St. Enoch's. He was examined before us, and proved that he knew Mary and knew her history. She attended his church for a period of eighteen months to two years fairly regularly, which he interpreted as meaning she might miss an odd Sunday. He had a number of interviews with her, and in his opinion she had clear Presbyterian views. We saw the child ourselves. She is a bright, intelligent child, between eleven and twelve; and the opinion we have formed of her coincides with that of the reverend gentleman.

What orders are we to make in the case of this child? We have to consider two matters: 1. The religion of the father and his expressed wishes; 2. The benefit of the child. We are not concerned with the pecuniary benefit, although in this case it is fairly equal. What we have to consider is: is it for the benefit of a child of this age to be handed over after the training she has received to be brought up in a different creed? In *Stourton* v. *Stourton* (1): "A Roman Catholic left a widow, also a Roman Catholic, and a posthumous child. The widow, some time after her husband's death, became a member of the Church of England, and without any interference on the part of

(1) 8 De G., M. & G. 760, at pp. 772-773.

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the child's other relatives, who were all Roman Catholics, brought him up as a member of the Church of England until he was upwards of nine years old; and it appeared, in an interview with him, that the distinctive doctrines of that Church had taken a strong hold on his mind. Held, that it was too late for the Court to give directions that he should be educated in the faith of his father." Turner L.J. there says: "I think it the duty of the Court, in cases of this description, to pursue that course (i.e., to see the children). That the minds of children are capable at a very early age of receiving strong impressions upon matters of religion, as well as upon other matters, is not to be denied; and having seen the infant plaintiff in this case, and considered what passed at our interview with him, I am satisfied that his mind has received impressions, and strong impressions too, upon religious subjects, which are at variance with the faith which his father professed. I have felt bound to consider, therefore, what might be the result of disturbing those impressions. It was urged at the Bar that the opinions of a child so young could not be fixed, and that the impressions which this child has received might be removed by a different course of instruction and different associations. It might be so; but, on the other hand, may it not be that the impressions which have been formed might lead to the instruction which would be given being received with carelessness or indifference, or which would certainly not be less dangerous or less destructive to the character of this boy, with affected acquiescence? May it not be that the attempt to force upon this child a different faith might end in unsettling his existing impressions and substituting no fixed impressions in their place? I much fear that it would be so. I think it the more probable, from the unhappy differences of opinion upon religious subjects between the mother (on whom the boy would naturally lean) and the father's family, who would as naturally endeavour to plant in the mind of the child opinions different from those which the mother entertains; but whether the consequences would or would not be such as I have pointed out, the danger of Mrs. Stourton's being removed from the guardianship being followed by such consequences is one to which I dare not venture to expose this child." We are of opinion, on these grounds, that it would not be for the benefit of Mary Ward to hand her over to her paternal relatives.

I now take the case of the other two children, Lila, aged six years, and Peggy, aged four years. It is not suggested that there is any fixed religious view entertained by these children, nor could there be at such a tender age. They also are residing with their grand-parents, who are both well advanced in years. It is obvious that quite different considerations apply in the case of these children. The mother is dead, and considerations which would arise were she living with the children do not apply. It becomes a question for us, where there is a conflict between the two sets of relatives for the custody, which is to prevail. It seems to us that the question of the infants' benefit does not arise

in the same way as it did in the case of the eldest girl; and, giving all due weight to the argument as to the separation of the children, we think in the case of Lila and Peggy the father's express direction should be followed.

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Brigid Ward, the paternal grand-aunt of the infants, appealed to the Court of Appeal, N.I. (1), against the order of the King's Bench Division in so far as it refused to transfer to her the custody of her grand-niece, Mary Ward. There was also a cross-appeal by Alexander Laverty and Margaret Laverty, the maternal grandfather and grandmother, to whom the custody of Mary Ward had been continued, against so much of the order as transferred to Brigid Ward the custody of the two younger sisters of Mary Ward, Lila Ward and Peggy Ward.

May 16, 17.

T. J. Campbell K.C. and *M'Corry*, for the applicant, Brigid Ward:—

The nearest paternal relatives should be allowed to stand in the father's shoes.

[MOORE L.J.: Have the paternal relatives a higher right than the maternal relatives?]

Campbell K.C.: In this case I most respectfully submit they have. This is the first time that a Court has judicially decided that a child who has been a Roman Catholic up to eight years of age, and is now eleven years of age, is capable of fixed, clear convictions on the difference between Roman Catholicism and Presbyterianism. The child had been reared as a Roman Catholic till she was eight years of age, and now she was asked to believe that everything she had learned during those years was false.

[ANDREWS L.J.: Suppose the mother were alive, what would be the duty of the Court if the father had directed that the children should be brought up as Roman Catholics and the mother was bringing them up as Protestants?]

Campbell K.C.: The Court would stop her doing so, or take from her the control or guardianship of the children.

[MOORE L.J.: The two sets of relatives come in here with equal rights, and all we have to consider is the benefit of the children and the wishes of the father.]

Campbell K.C.: The Court should not separate the children. If the father died suddenly without expressing any wish as to their future, would they not be brought up in the father's faith? We submit that the evidence shows that the father never forfeited his rights, and never having done so, his wishes ought to be carried out.

[MOORE L.J.: Irrespective of the welfare of the children?]

Campbell K.C. Yes, irrespective of the welfare of the children, once the father is shown never to have abandoned his

(1) In the Court of Appeal, before MOORE and ANDREWS L.JJ.

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personal right to indicate the religion of the children. The question of the welfare of the children does not arise in an acute way in this case. If it does, the balance of welfare is on our side. The Court ought not to be guided by the wishes of a child of eleven years of age, having regard to her previous training. The father never having abandoned his parental rights, expressed his wishes in his will. These wishes should be carried out, and do not conflict with the welfare of the children. In the nature and circumstances of the case, Mary Ward at the age of eleven could not have such settled convictions as it would be dangerous to disturb.

[ANDREWS L.J.: You admit that there is a proposition of law that if the child has really settled convictions, whether Presbyterian or Roman Catholic, the Court should be slow to interfere?]

Campbell K.C.: Yes, if so settled that it would be dangerous to her welfare to disturb them.

[ANDREWS L.J.: Then you say that the child has not got firm, settled convictions?]

Campbell K.C.: Yes.

[ANDREWS L.J.: Do you contend that the decision of the King's Bench as regards Mary should be set aside on the ground that the Court had acted erroneously in interviewing Mary, a girl of the tender age of eleven years?]

Campbell K.C.: I submit that a judicial interview on such a matter with so young a child is not a satisfactory procedure.

[MOORE L.J.: We may assume that unless you get the custody of these children there is no way of bringing them up as Roman Catholics. We could not, if we would, direct the grand-parents to bring them up as Roman Catholics.]

Campbell K.C.: I am sure that it would lead to insuperable difficulties in their present surroundings. The King's Bench Division has exercised a proper discretion as regards the welfare of the two younger children.

[They also referred to: *In re Newbery* (1); *Hawksworth* v. *Hawksworth* (2); *Andrews* v. *Salt* (3); *In re Agar-Ellis* (4); *In re Clarke* (5); *Talbot* v. *Earl of Shrewsbury* (6); *In re Scanlan, Infants* (7); *In re Newton, Infants* (8); *F.* v. *F.* (9); *In re W., W.* v. *M.* (10); *Barnardo* v. *M'Hugh* (11); *In re Violet Nevin, an Infant* (12); *In the Matter of Cecilia Browne, a Minor* (13); *In re Hyndman, Infants* (14); *In re Harriet O'Hara, an Infant* (15); *In re Grey, Infants* (16); *R.* (*M'Conway and Byrne*) v. *Guardians of the Poor of the Belfast Union* (17); *In re Story, Infants* (18).]

(1) L. R. 1 Ch. App. 263.
(2) L. R. 6 Ch. App. 539.
(3) L. R. 8 Ch. App. 622.
(4) 10 Ch. D. 49.
(5) 21 Ch. D. 817.
(6) 9 L.J. N.S. 125.
(7) 40 Ch. D. 200.
(8) [1896] 1 Ch. 740.
(9) [1902] 1 Ch. 688.
(10) [1907] 2 Ch. 557.
(11) [1891] A. C. 388.
(12) [1891] 2 Ch. 299.
(13) 8 I. Ch. R. 172.
(14) 39 I. L. T. R. 191.
(15) [1900] 2 I. R. 232.
(16) [1902] 2 I. R. 684.
(17) [1908] 2 I. R. 343.
(18) [1916] 2 I. R. 328.

Murphy K.C. and *Lowry*, for the respondents:—

This case must be judged on the facts. In all the authorities quoted there was no case precisely the same or even approximating to that before the Court. The father's wishes as expressed in his will must be read together with his previous conduct. The expression in the will does not add any special weight to applicant's case. The Court must weigh in the scales the welfare of the children on the one side, and the expressed wishes of the father on the other. The Court is bound to consider the welfare of the children. They would have to ask who is the party applying for the custody of the children, and who are the parties from whom it is sought to take the children. The welfare of the children will be best realized by their remaining with the Lavertys. The Court of King's Bench went wrong in not attaching due weight to the consideration that a family of three children of these ages should not be broken up. Religion is only one of the elements to be considered in deciding what is best for the welfare of the children. The rights of the paternal relatives are no greater than those on the maternal side. We submit that considerations of welfare must come first: *In re W., W.* v. *M.* (1); *In re Story, Infants* (2); *In re Connor, an Infant* (3). *Stourton* v. *Stourton* (4) is still good law, and has been frequently referred to with approval. In *In re M'Grath, Infants* (5), Lindley L.J. laid down the principle that it is the duty of the Court in such a case as this to leave the child alone, unless it is satisfied that the change would be for the benefit of the child.

[They also referred to: *The Queen* v. *Gynyall* (6); *In re Harriet O'Hara* (7); *Warde* v. *Warde* (8).]

Campbell K.C., in reply:—

In the King's Bench the Court misapprehended the law in regard to the eldest child. The Courts look at the welfare of the child through the father's eyes. There is no such principle as the unity and non-separability of the family; and in any case it is the attempt to make the eldest child a Presbyterian that is causing the break-up of the family. The King's Bench Division would have handed the eldest child over to the applicant except for the question of settled Presbyterian views. There is no trace of any indifference to religion on the part of the father. In all this long line of cases the Courts have treated matters of religion as of paramount importance; and we submit that the father's wishes, where, as in the present case, never abrogated or foregone, should be paramount.

Cur. adv. vult.

(1) [1907] 2 Ch. 557.
(2) [1916] 2 I. R. 328.
(3) [1919] 1 I. R. 361.
(4) 8 De G., M. & G. 760.
(5) [1893] 1 Ch. 143.
(6) [1893] 2 Q. B. 232.
(7) [1900] 2 I. R. 232.
(8) 2 Phillips R. 786.

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June 1.

MOORE L.J. :—

This was an appeal by Brigid Ward against an order of the King's Bench Division in so far as it refused to transfer to her the custody of her grand-niece, Mary or Mollie Ward, and a cross-appeal by Alexander Laverty and Margaret Laverty, the maternal grandfather and grandmother, to whom the custody of Mary Ward had been continued, against so much of the order as transferred to Brigid Ward the custody of the two younger sisters of Mary Ward, Lila Ward and Peggy Ward, aged seven and four years old respectively.

So far as Mary Ward is concerned, it is admitted by Mr. Campbell that if she has settled religious convictions, which it would not be for her benefit to disturb, she cannot be taken from the custody in which she now is and handed over to her paternal grand-aunt, the applicant, for the purpose of being instructed in the doctrines of a different faith. He, however, contends that there is not sufficient evidence of this, and that the King's Bench Division, who interviewed the child, ought not to be guided by anything which occurred at that interview, and, indeed, that it should never have taken place.

As regards the first contention, it must be remembered that we are a Court of Appeal, and that the King's Bench Division are a Court exercising also their own discretion; and while undoubtedly an appeal lies, we should be slow to exercise our discretion in a different way from the Court below "unless," in the words of Campbell C., now Lord Glenavy, in *In re Connor, an Infant* (1), "the Court of Appeal is satisfied there has been some clear misapprehension of fact or misapplication of law." The evidence in the Court below, fairly summarised as regards Mary, was that since June, 1920, nearly three years ago, when she was eight years old, and in disregard of the wishes of her deceased father, she attended schools under Protestant management. The grandmother, Margaret Laverty, in her affidavit states that Mary is thoroughly well instructed for her years in the Presbyterian faith, and that any attempt to change her belief now would be detrimental to her spiritual welfare. The Rev. Mr. Pollock, a Presbyterian clergyman, who has personal knowledge of the child, orally swore, subject, no doubt, to cross-examination, that she had definite Presbyterian views. Once this is so, it cannot affect the case whether or not her mother committed a breach of duty in permitting her to acquire them; we can only deal with the facts as we now find them. The members of the Court below, the Lord Chief Justice and Brown J., subsequently had a personal interview with the child, and came to the conclusion that Mr. Pollock had correctly stated her religious condition, and that it would be dangerous to her religious faith now to disturb her convictions. The only evidence contra was that of the Rev. Bernard Laverty, who had not seen the child of recent years, and who merely

(1) [1919] 1 I. R. 368.

expressed the opinion as a clergyman that she could not have at the age of eleven any settled convictions. As a matter of opinion this cannot necessarily be correct. The state of a particular child's religious convictions depends upon two conditions: one the capacity shown and attention given to the child by her instructor, and the other the intelligence and receptivity of the child. Each case must be governed by its own circumstances; and, while some children of eleven might not be so affected, it is equally possible that others of the same age might be so. In *Stourton* v. *Stourton* (1) the age of the child who was held to have settled convictions was only nine; in *Hawksworth* v. *Hawksworth* (2) a boy of twelve was held not to have them. There can be no judicial rule. If the King's Bench Division had held otherwise than they did, having interviewed the girl, I should not have interfered with their discretion. However, the King's Bench, as a result of this evidence and of what transpired at the interview with the child, came to the conclusion that the child had such settled convictions. We have not been told what happened at the interview, and the Judges in the Court below having found as stated, I consider that we should not reverse their finding.

We have not been asked to interview the child by either of the parties. In my opinion, however, though some Judges have expressed disapproval, the practice has now become established. So Gibson J. says in effect in *Re Story* (3). In this country it was done by Lord O'Hagan in the case of *Meades, Minors* (4), and by Ball C., expressly following Lord O'Hagan, in *Grimes, an Infant* (5). In *Meades, Minors* (4), Lord O'Hagan gives his own justification for doing so. *Meades, Minors* (4) was decided in 1871; but in *In re O'Hara* (6) FitzGibbon L.J. says: "It was argued that Kenny J. ought not to have consulted or considered the wishes of Harriet O'Hara, because she was only eleven years old, though he found her capable of expressing those wishes strongly and intelligently. I entirely dissent from this contention. From the time of King C., in *Ex parte Hopkins* (7), (a case decided in 1732, where the Chancellor interviewed the eldest daughter, then aged thirteen, in Court, and asked her questions and her wishes), the Court of Chancery has exercised its discretion in seeing young children, not for the purpose of obtaining their consent, but for the purpose, as one of the best modes, of determining what is really for their welfare . . . Kay L.J. distinctly approved of the practice where the child is of any reasonable age of seeing and speaking to it, of ascertaining its own views on the matter, and of treating them as a main matter for consideration in the exercise of the parental jurisdiction. But, on the other hand, the parent's prima facie right must also be considered, and the wishes of a child of tender years

(1) 8 De G., M. & G. 760.
(2) L. R. 6 Ch. A. C. 539.
(3) [1916] 2 I. R., at p. 347.
(4) 5 I. R. Eq. 98, at p. 115.
(5) 11 I. R. Eq. 465.
(6) [1900] 2 I. R. 222, at p. 240.
(7) 3 P. W. 151.

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must not be permitted (to use the words of Lord Campbell) to subvert the whole law of the family, or to prevail against the desire and authority of the parent, unless the welfare of the child cannot otherwise be secured." Similar interviews were held in *In re W.* (1) by Kekewich J., with the full approval of the Court of Appeal (p. 566).

I think the Court were quite entitled to see the child. It does not appear whether or not they consulted her wishes, but if they had done so, it is clear from the judgments to which I have referred that they could also have taken them into account as one of the elements in the case. I accordingly hold that the appeal against that part of the order refusing to transfer Mary Ward from the care of her maternal grand-parents should be dismissed with costs of the appeal, as hereinafter limited.

The case of the younger children, who have no settled religious convictions to be disturbed by a change of custody, presents much more difficulty; but our order as to Mary Ward must of necessity influence to some extent our judgment on this subject. The case is one entirely of custody. Mr. Campbell, in reply to a question from the Court, expressly stated that if he failed on behalf of his client to obtain an order for the transfer of the children, he did not desire any order for their education in their present surroundings in the Roman Catholic religion, which in the circumstances of this case might be impossible, or at any rate difficult, to enforce. We have to consider in the circumstances of this case, firstly, whether the direction in the will of the infants' father renders it imperative on us without more to transfer their custody to his aunt, who will bring them up in his religion; or, secondly, whether that direction is to be governed by considerations of the children's welfare; and thirdly, whether we can say that in our opinion the Court below have so misapprehended the case as to require us to reverse their decision, as was done by the late Court of Appeal in reversing Kenny J. in *Re O'Hara* (2). In the first place, let me say that I can find no foundation in law for the proposition strenuously advanced by Mr. Campbell that in the case of children of a legitimate marriage, where father and mother are both dead the relatives, however remote, on the paternal side have a claim to the custody of the child superior to that of relatives, however near, on the maternal side. The law only recognizes the father as having a pre-eminent right when living, or his testamentary guardian when dead—then in certain circumstances the mother; and if for reasons appearing proper to the Court the child is taken into wardship, then the guardian of the child so appointed. After these the Court gives a preference in appointing a guardian to the nearest relatives of the children as seems to the Court fit; but it appears to be immaterial on which side they are related, and the discretion is in the Court, and not as of right in any of the parties: Halsbury,

(1) [1907] 2 Ch. 557. (2) [1900] 2 I. R. 232.

vol. xvii, pp. 126–7. I state this because in the present case I am willing to assume for the sake of argument, though I do not judicially so decide, that the infants' paternal grand-aunt has equal claims with the infants' maternal grand-parents to be entrusted by the Court with their custody, though certainly nothing more.

The application is based on the desire of Brigid Ward to carry out the testamentary wish of the deceased father, that his children should be brought up in his own religion. This is the sole ground; it is not suggested that the children in all material respects are not brought up in comfort and are not perfectly happy at present, and there is a striking absence of any expression of affection for them on the part of the applicant. They are to be brought to live with the applicant's sister, Mrs. Jordan, in a house stated to be the upper portion of Gilbey's stores in the High Street, Bangor; and Mr. Campbell states that they will probably be sent to school, whether in a resident institution or at a day school does not appear. Mr. Campbell argues that in the present case the father's wishes must be carried out—I quote his own words—"irrespective of the children's welfare." I do not think that this is the law, and it is certainly inconsistent with his admission in the case of the elder child Mary, on which I have ruled; but before I deal with that topic, I will permit myself to make two observations. Gibson J. points out in *In re Story* (1) that the legal rights of a living and dead father are on the same plane. But there can be no doubt that in construing the wishes of a dead father in a situation arising subsequently and apparently not contemplated by him there must always be some element of uncertainty. The father here obviously did not contemplate the early death of his wife in the lifetime of the infants, for he made no provision for it. If he were now living, it would be a matter for some speculation whether he would leave the children to be supported by their grand-parents and waive his wishes as to their religion, or support his motherless children and insist upon his religious wishes. As Kekewich J. observed in the case of *In re W.* (2): "If I must ask myself what the father would say if told all that has since occurred, I am confronted with the insuperable difficulty of being unable to conceive how the question would present itself to his mind." On this no one could pronounce with absolute certainty. This is also an element in the case; but at the same time I do not forget that even if he had expressed no wish at all, the law would infer, from the circumstances, his desire that they should be brought up in his own religion.

The second observation I would make is this. There are many reported cases in which the father has been held by conduct to have abandoned his right of control. *In re Story* (1) is one of the latest. I do not hold that Ward on the facts of this case did finally abandon his right; we have not enough evidence. But

(1) [1916] 2 I. R. 328. (2) [1907] 2 Ch., at p. 559.

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after a married life of nearly ten years, during which his wife and their children were frequently obliged to return to her father because, owing to Ward's habits of intemperance, he was unable to provide for them, he finally, six months before his death, broke up the home, sold the furniture, sent, or at least assented to, his wife and children going once more to be supported by her father, and himself retired to the house of his brother, a publican at Ballyward, where he lived till his death, never contributing one penny to their support. This, be it remembered, was but a culminating step in a married life ruined by his own unfortunate habits. The law gives the father rights over his children, because in nature he is supposed to be their natural support and protector. If these are his rights, they are correlative with his duties. But this is not a case corresponding with "the honest and loving parent" referred to by Lord O'Hagan in *Meades, Minors* (1); it is certainly a case of which Fitz-Gibbon L.J., in *In re O'Hara* (2), speaks when he refers to the "unmindfulness of parental duties"; and when such a father leaves his wife and children for their support to the charity of others, and so neglects his natural duties towards them, I am not prepared, unless the law compels me, to treat his rights and expressed wishes as necessarily a supreme and overriding direction for the future of the children, or, as Mr. Campbell puts it, "a sacrosanct trust." Does the law so compel me? I think not. In *Meades, Minors* (1) Lord O'Hagan carefully considered every aspect of the children's welfare before allowing an irreproachable father to retain their custody. He said, at p. 105: "One great question in all these cases was as to the interest and happiness of the child, and this has always been more or less a composite question, involving regard to health, position, and prospects, as well as the important consideration of religious faith." And in *In re M'Grath, Infants* (3) Lindley L.J. says: "An infant child is to be brought up in its father's religion unless it can be shown to be for the welfare of the child that this rule should be departed from, or the father has otherwise directed. This we believe to be the true state of the law. The law is not so rigid as to compel the Court to order children to be brought up in the religion of their deceased father regardless of the consequences to themselves." This is only part of a long course of authority. I respectfully adopt the view of Cozens-Hardy M.R., who, in *Re W.* (4), quotes with approval the following passage from the considered judgment of Lindley L.J. in *In re M'Grath* (3): "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered

(1) 5 I. R. Eq. 98, at p. 105.
(2) [1900] 2 I. R. 232.
(3) [1893] 1 Ch. 143, at p. 148.
(4) [1907] 2 Ch. 557.

as well as its physical well-being." The law does not impose on the Court a duty of doing more than to order a child to be brought up in its father's religion unless there are sufficient reasons for doing otherwise. The word "welfare," as thus pointed out, includes religious, moral, intellectual, and temporal benefit, including even happiness. When all these are considered, it is obvious that no question of bartering the child's future for mere financial considerations can arise. It could not in any event arise here, because no complaint is made that the children in their present home lack any material comfort, and also because in the judgment of the Lord Chief Justice it is stated that the financial position of the parties is equal. I therefore think that it is the duty of the Court, acting as "a wise and affectionate parent," and paying a proper regard to the wishes of the dead father, to consider when it arises the question of the welfare of the children, and to give effect to such considerations if of opinion that such should be done. I proceed to do so.

What would be the effect of the order of the King's Bench Division if we affirmed it? That these three little children would be members of a family separated in residence and broken up in companionship by the chasm of different religions; that in being removed from a home in which they are admittedly happy to the care of people who, although blood relatives, are apparently little known to them, they would lose the society of those they love, and be cut off from their only sister. In my opinion it would be cruel to all of them with such results so to transplant the two younger children. So far as the father's wishes go, it is at least consistent with them to suppose that he contemplated their being brought up together, with the trustee, their mother. The contingency of their being divided had probably never occurred to him. I believe if we could secure a jury from which all religious prejudice on either side could be excluded, and ask them as men of the world, with human sympathies, would it be for the welfare of these children that they should be cut off from one another, no matter what religion they were to be brought up in, because all Christian religions are equal to this Court, that the answer would be in the negative. The Courts in many cases have acted on this view. In *Warde* v. *Warde* (1), of which, however, I have been unable to read the full report, and *In re Story* (2), Gibson J., referring to *Warde* v. *Warde* (1) and *Re Newton* (3), said: "The separation between children living together from their birth would completely put an end to any semblance of family ties, and is always where possible to be avoided." In *Meades, Minors* (4), to which I again refer, a strong argument, as reported, was made before Lord O'Hagan of the situation created by removing two of the applicant's children

(1) 2 Phil. 786.
(2) [1916] 2 I. R. 328, at p. 346.
(3) [1896] 1 Ch. 740.
(4) 5 I. R. Eq. 98.

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from the society and companionship of the third, and to this I think Lord O'Hagan referred when he laid stress on a united family. I adopt the expressive words of Holmes L.J. in *In re O'Hara* (1): "Being strongly impressed with the importance in the interests of children of maintaining, where it is possible, the bond of the family with the duties and affections that spring therefrom, and believing that this is the view hitherto taken by the illustrious men who have administered this branch of our law, I am not prepared in this instance to make a precedent." It is true that that was a case where a mother sought to recover her child; but, though to a lesser extent, I think, the observations have some force in a case where the family consists of three little sisters living happily with their own mother's father and mother.

In my judgment it would not be for the welfare of the two younger children to remove them from the society of their sister and grand-parents, who have proved themselves to have been affectionate guardians in their time of necessity. Holding this view, it seems to me that, in the words of Lord Glenavy, already quoted above, "there has been such a clear misapprehension of fact" in the judgment of the Court below, that we are at liberty to supervise the discretion they have purported to exercise. I am of opinion that, in fact, the Judges in the King's Bench Division cannot have given "due consideration to the argument against separation of the family." We are doing what the Court of Appeal did in respect of the judgment of Kekewich J. in *In re W.* (2), already referred to. I consider, therefore, that I am at liberty to hold, as I do hold, that it would be for the welfare of all the children to be brought up together in their present custody, using the word "welfare" in its widest sense, and irrespective of the particular form of religion in which it is sought to educate them; and I think in the case of the younger children, Lila and Peggy, the appeal should be allowed, and the order of the King's Bench Division discharged, with the costs of the appeal.

We direct that, apart from the costs of the notices and setting down and entry of each appeal, there should be only one set of costs for the appeal and cross-appeal, as there was in fact but one hearing.

ANDREWS L.J.:—

No more difficult or delicate duty falls to the lot of a Judge to discharge than the determination of the rival claims of the father and mother, or, after their death, of representatives of their respective families, to the custody and control of infant children; and the painful and responsible character of this duty is intensified many times where it is admitted, as in the present case, that the real and vital issue for the consideration of the Court is the particular form of

(1) [1900] 2 I. R. 232, at p. 257. (2) [1907] 2 Ch. 557.

religious belief in which the offspring of a mixed marriage should be educated. There is only one secure foothold in such a case. The Court in exercising its jurisdiction must divest itself of all trace of bias in favour of one particular faith over another. In our Courts all Christian religions are equal. There is no judicial preference for one form of Christian belief over another, so that the welfare of children cannot be regarded as in any way prejudiced by bringing them up in one form rather than in another form of Christian faith.

A mass of authorities has by the industry of counsel been laid before us, and I have consulted several others during the interval which has elapsed since the arguments were completed, but in no case are the facts identical with the present; and, although a close examination of these cases is necessary for a proper appreciation of the legal principles involved, this case must, like every other, be decided on its own special facts.

In his argument in support of the appeal in the case of the eldest child, Mary, Mr. Campbell, on behalf of Brigid Ward, based his case in the first instance on the right which, as I understood him, he boldly claimed to be an absolute one, that the child should be educated in the religion of her father, and in conformity with his wishes wholly irrespective of the child's welfare. This, he stoutly maintained, was the paramount consideration which must determine every case in which questions of religious difference arise. If in the facts of any particular case the application of this fundamental principle necessarily involves a sacrifice of the welfare of the child, such welfare, being, as he contended, a matter of secondary importance, must suffer. This submission of Mr. Campbell was not one of choice but of necessity, for it is the sole ground relied upon in the affidavit of his client for taking away this child from the comfortable home and fostering care of her maternal grand-parents in whose house she has uninterruptedly resided for a period of almost three years. It is the width and generality of the proposition contended for which gives a special importance to this case.

I desire to dissociate myself at the outset from a proposition which in my opinion derives no support from either authority or common sense. I recognize and freely admit that it is the prima facie right of the father in his lifetime to have his children educated in his own religion. It is, further, as was laid down in *Hawksworth* v. *Hawksworth* (1), in general the duty of a widowed mother to bring up her child according to the faith which the father professed, though she utterly disapproves of it. But a long chain of authority has established, too clearly now to admit of any doubt, that the Courts will interfere with these rights on various grounds of which I do not propose to give any exhaustive classification. He may lose his parental rights by his own conduct and unfitness of character, such as immorality, by callous indifference to his own and his children's religious observances, by the

(1) L.R. 6 Ch. App. 539.

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profession of immoral or irreligious opinions or other circumstances which render him unfit to have the charge of the child. He may likewise disentitle himself from having his child brought up in his own faith if he has acquiesced in its being educated in some religion from which he dissents until it has acquired settled religious views and convictions which it would be dangerous to disturb, for no fixed opinions might be substituted in their place. As Napier C. said in *In re Browne* (1), "the actual conscientious convictions of a minor who may have arrived at the age of conscious responsibility are to be secured against any undue pressure or coercive influence."

Many cases could be cited in which the Court has recognized this limitation of parental right. *Stourton* v. *Stourton* (2), so fully referred to by Henry C.J. in the judgment of the Court in the King's Bench Division, is one of the earliest reported cases of recognized authority in which the law on this point was clearly enunciated; and Malins V.C. made it the basis of his judgment in *Andrews* v. *Salt* (3). In all these cases the underlying principle upon which the Court acts in holding that the father's wishes must be ignored is that it would not be for the welfare of the child that they should be regarded. In other words, the prima facie right of the father yields place to the paramount consideration of the well-being of the child when these are opposed and in conflict with one another. "Religion is," as Gibson J. expressed it in his illuminating judgment in *In re Story* (4), "an important factor, but it may be that the father's religion must give way to the interest of the child." In this respect it is immaterial whether the father is alive or dead. In *In re McGrath, Infants* (5), the father of the infants, who had been a Roman Catholic, was dead, the children were in the care of a benevolent lady, a member of the Church of England, who had been lawfully appointed by the mother to be guardian of her infant children before her death. The claimant was an aunt of the father, and herself a Roman Catholic. A strong Court of Appeal held in the circumstances of the case that it would not be for the welfare of the children that the guardian should be removed, and refused to give any direction as to their religious education. Lindley L.J. in delivering the judgment of the Court is reported as follows: "The law," he says, "is not so rigid as to compel the Court to order children to be brought up in the religion of their deceased father, regardless of the consequences to themselves. This point was carefully considered by the present Lord Justice Kay in *In re Clarke* (6), and more recently by this Court in *In re Nevin* (7). *Hawksworth* v. *Hawksworth* (8), in which

(1) 8 Ir. Ch. R., at p. 176.
(2) 8 De M. & G. 760.
(3) L. R. 8 Ch. A. C., at p. 622.
(4) [1916] 2 I. R., at p. 340.
(5) [1893] 1 Ch. 143, at p. 148.
(6) 21 Ch. D. 817.
(7) [1891] 2 Ch. 299.
(8) L. R. 6 Ch. App. 539.

the duty of a guardian to bring up a child in its father's religion, and the duty of the Court to order this to be done, was most emphatically asserted, does not warrant the contention that there are no exceptions to this general rule; and the Court will always depart from the rule for sufficient reason. The welfare of the infant is the ultimate guide of the Court."

What then does the welfare of the eldest child, Mary Ward, now demand? On the evidence before us the father led an intemperate life which ultimately resulted in his losing his employment and in his coming within the meshes of the criminal law charged with an offence for which he received the substantial sentence of six calendar months, subsequently reduced to one calendar month. Later, when he had recovered from an attack of delirium tremens, he went to America, where he remained for a short time; and his conduct to his wife on his return is alleged to have been such that she was forced to go with her children into lodgings unknown to him in another part of the city. I shall not trace the other incidents of their unhappy married existence, which culminated, some months before his death in 1920, in the homeless wife seeking refuge and shelter with her three infant children, not, indeed, for the first time, in the hospitable home of her own father and mother, Alexander and Margaret Laverty. There they all remained until the death of the unfortunate wife on 23rd March last. During this period of almost three years these children have been brought up in a Protestant home. Some months before her father's death the eldest girl, Mary, had been removed from the Roman Catholic School, in which she had for some time previously been receiving her education, to a Protestant National School. It is alleged that this was done with the father's knowledge and consent, but this is denied. Such denial, however, appears to me quite immaterial; for absence of knowledge of this important change in the early life and education of his eldest child, would only confirm the allegation made by Alexander Laverty in his affidavit that never in his lifetime did the father manifest the slightest interest in the welfare, spiritual or otherwise, of his children. It is submitted on behalf of the applicant, Brigid Ward, who is a paternal grand-aunt of the children, that if during these few months immediately preceding his death the father of the children had brought an application to have the children restored to his custody and to have them educated as Roman Catholics, he must have succeeded; and it is argued that the present applicant must likewise succeed. I must not be understood as assenting to the proposition that a Court, looking, as I conceive it to be its duty, to the true welfare of the children, would have taken them from a loving and devoted mother to restore them to a father whose record I have sketched, and who had neither house nor furniture, nor the means to provide them with the bare necessaries of life. But, even if the father's position had improved, and he could have obtained an order of the Court for the restoration of his children, it does not follow

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that in law his aunt is now entitled to a similar order. In the period which has elapsed since his death the children's mother and their maternal grand-parents have educated the children in such a way that the eldest child, Mary, has now acquired what Rev. John Pollock, of St. Enoch's Presbyterian Church, describes as decided convictions in favour of the Presbyterian Church, whose services she has been attending. This opinion is shared and confirmed by the Lord Chief Justice and Mr. Justice Brown, who interviewed the child. All three children have received every comfort, care, and attention in the home of their grand-parents where mutual love and devotion prevail. Apart from the religious element in the case, the removal of this child from the kindly care of the Lavertys would in my opinion amount to what was described by Chitty J. in *In re Nevin* (1), as an "unnecessary cruelty." Is it then for the welfare of this eldest girl, Mary, that the Court should now play, what Lindley L.J. so graphically describes in *In re McGrath, Infants* (2), as "battledore and shuttlecock with her religious education"? or is it for her welfare that she should be taken from a home where love and happiness surround her to be placed in a house of which the ground floor consists of licensed premises (as to which, see the judgment of Campbell C.J. in *In re Boyd* (3)), under the care of a lady who bases her claim entirely on the ground that the child should be educated in her father's religion in accordance with his testamentary wishes, who in her affidavit does not profess to have any affection for any of the children, or interest in their material welfare, and who, on the contrary, is alleged by Margaret Laverty never to have troubled about them or taken any interest in them? The question when so stated appears to me to answer itself. "The duty of the Court," to quote once again from the judgment of Lindley L.J. in *In re McGrath, Infants* (4), "is in our judgment to leave the child alone unless the Court is satisfied that it is for the welfare of the child that some other course should be taken." The best interests, the true happiness and welfare of Mary Ward alike demand that she be left alone in the Lavertys' care, where the happy associations of home life may be preserved. "The Court is not obliged to do what," to quote the words of Kay L.J. in *In re Nevin* (5), "I am satisfied is not for the child's benefit, to take her away from a kind friend for the mere purpose of having her brought up in another branch of the Christian religion." The order of the King's Bench Division in regard to her custody must be affirmed; and in saying so I only wish to add that I have not stated, or intended to state, anything to interfere with the absolute right of a good and honest father who has in no way abdicated or abandoned his right to determine what is best for the spiritual and temporal welfare of his children.

(1) [1891] 2 Ch. 299.
(2) [1893] 1 Ch. 143, at p. 151.
(3) [1918] 2 I.R. 98, at p. 100.
(4) [1893] 1 Ch. 143, at p. 148.
(5) [1891] 2 Ch., at p. 316.

Turning now to the case of the two younger children, Lila and Peggy, I confess that we are presented with greater difficulties. It is not, and indeed, from their tender age, it could not reasonably be suggested that either of these children has acquired any settled religious convictions, or any belief save such as is necessarily impressed on the youthful mind by what Farwell J. calls "the unconscious influence of everyday life and conduct." In this respect, therefore, the Lavertys' claim to their custody is much weaker than in the case of their sister Mary. I have given their case much anxious thought; I have borne in mind the principles enunciated in the decided cases; I have considered the judgment of the Lord Chief Justice in the King's Bench Division, and I have now come to the clear and definite conclusion that the material and spiritual welfare of these children requires that they also be left in their present home.

There is one principle to be found so frequently expressed in the reported cases that no one could question its authority or importance. In *Warde* v. *Warde* (1), Lord Cottenham deplored the effect, and pointed to the danger of bringing children of the same family up in different custodies; and as he was of opinion that the eldest child—a girl—could not properly be handed over to the father, the other children were also entrusted by the Court to the custody of the mother. In *In re Clarke* (2) Kay J. rejects the suggestion of a "divided household." In *In re McGrath, Infants* (3), the Court held that the eldest girl, who was fifteen years of age, wished to remain where she was, and it was not the duty of the Court to interfere with her; and in these circumstances they came to the conclusion that it was not for the benefit of the three youngest children—two girls and a boy—that their religious education should again be changed. In *In re Newton, Infants* (4), Kekewich J. referred to the mischief which would probably result from the separation of the younger child of eleven years from her elder sister aged fifteen. This view was approved of on appeal by Lindley L.J. and Kay L.J., the former of whom stated that Kekewich J. was quite justified in coming to the conclusion that it would be most undesirable and extremely detrimental to the welfare of the two little girls that they should be separated from one another. Our Irish Courts have always taken the same view. In *In re Hyndman, Infants* (5), O'Brien C.J. based his judgment in part on the consideration that "it was infinitely better that these children should not be separated"—a view with which Gibson J. expressly concurred, and which he re-affirmed in the more recent cases of *In re Grey* (6), and *In re Story* (7), in the latter of which he said that the separation between children living together from their

(1) 2 Phil. 786, at p. 791.
(2) 21 Ch. D., at p. 828.
(3) [1893] 1 Ch. 143.
(4) [1896] 1 Ch. 740, at p. 743.
(5) 39 I. L. T. R. 191.
(6) [1902] 2 I. R., at p. 694.
(7) [1916] 2 I. R., at p. 346.

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birth would completely put an end to any semblance of family ties, and is always where possible to be avoided." Important as this principle is in the upbringing and education of all children, it is, as pointed out by Cozens Hardy M.R. in *In re W.* (1), of greater importance where the children are, as in the present case, all of the same sex.

I am therefore supported by high and consistent judicial authority in maintaining as I do the family bond from which alike duties and affections spring; and in arriving at this conclusion I am not unmindful of the argument addressed to us by Mr. Campbell in his appeal on behalf of Mary Ward, that these children should not be separated from one another, as the eldest would be a sort of second mother to the younger.

For all these reasons I agree with Moore L.J. that the order of the King's Bench Division in reference to these children, Lila and Peggy, must be reversed.

Solicitors for appellant: *D. O'Rorke & Son.*
Solicitors for respondents: *C. & H. Jefferson.*

J. M'C.

(1) [1907] 2 Ch., at p. 569.

IRISH AGRICULTURAL WHOLESALE SOCIETY *v.* ST. ENDA'S CO-OPERATIVE SOCIETY (1).

Appeal.
(*I. F. S.*)
1923.
Dec. 13.

Practice—Service—Unsafe for civil bill officer to serve writ—Substituted service—Order 9, rule 5—Executive Minister's statement—Protection unnecessary—Jurisdiction of Court.

A writ sent to a civil bill officer for service was returned by him on the ground that it would be impossible and unsafe for him to endeavour to effect personal service without protection. In reply to a letter from the plaintiffs' solicitors asking whether protection would be afforded, the Minister for Home Affairs wrote that he did not consider "that the present state of the country is such as to make it necessary to provide military protection for the service of writs."

Held (reversing Dodd J.), that leave to effect service through the post should be given, and that an Executive Minister had no right to limit the jurisdiction of the Court unless express statutory power was given to him for that purpose; also that no statement by a Minister could or ought to affect a Judge in the performance of his judicial duty.

APPEAL ex parte from an order of Dodd J. refusing leave to serve the writ by post. The action was brought for the recovery of £104 13s. 6d., the price of goods sold by the plaintiffs to the defendants, carrying on business at Spiddal, County Galway. The facts, as stated in an affidavit by Mr. William J. Lundy, member of the firm of Messrs. Hayes & Sons, solicitors for the plaintiffs, were as follows:—

On August 15th, 1923, Messrs. Hayes & Sons forwarded to their agents, Messrs. Blake & Kenny, solicitors, Galway, the original writ and a copy thereof for the purpose of having it served upon the secretary of the defendant society by the civil bill officer; and on September 6th the writ was returned by Messrs. Blake & Kenny, with a covering letter stating that the civil bill officer refused to serve it without protection. On September 11th Messrs. Hayes & Sons wrote to the Ministry of Home Affairs, stating that the process server was unable to effect service unless he obtained protection from the authorities; that he had called at the military barracks and also on the Civic Guard, but protection was refused. They asked that arrangements should be made to enable the writ to be served, as otherwise they would have to make an application to the Court to substitute service. On September 15th the Secretary to the Minister for Home Affairs replied as follows:—"I am directed by the Minister for Home Affairs to acknowledge the receipt of your letter of the 11th inst. on the subject of the protection of Mr. Richard M'Nevin, process server, Galway, whilst serving writs, and in reply to inform you that the military have been asked to

(1) Before MOLONY C.J. and RONAN L.J.

Appeal. (*I. F. S.*) 1923.

IRISH AGRIC. WHOLESALE SOCIETY *v.* ST. ENDA'S CO-OP. SOCIETY.

afford him any possible protection whilst engaged in these duties." Messrs. Hayes then communicated with Richard M'Nevin, informing him that the necessary protection would be forthcoming. They again enclosed him the writ, with a copy thereof, and on October 19th they received a letter from him stating that he could get no protection, as the Special Infantry Corps, who used to assist the civil bill officers in the execution of their duties, had been withdrawn. The solicitors communicated the contents of the letter to the Ministry of Home Affairs, and again asked if protection would be afforded. To this letter they received the following reply, dated November 16th:—"I am directed by the Minister for Home Affairs to acknowledge receipt of your letter of 13th inst. with reference to the difficulty experienced in having the writ served. In reply I am to say that the Minister does not consider that the present state of the country is such as to make it necessary to provide military protection for the service of writs." The solicitors then asked the process server if he would effect service without protection. In reply the process server wrote on November 19th, returning the writ with others, and stating that it would be impossible and unsafe for him to endeavour to effect personal service.

On the application for leave to substitute service, Dodd J. made the following order:—"On motion of Mr. Carson, of counsel for the plaintiffs, and on reading the affidavit of William J. Lundy, filed 1st of December, 1923, and the Court being of opinion that it cannot override the statement of the Minister for Home Affairs referred to in said affidavit, to the effect that he 'did not consider the present state of the country was such as to make it necessary to provide military protection for the service of writs,' it is ordered that the said motion do stand refused."

Carson, for the appellants: I rely on Order 9, rule 5.

MOLONY C.J.:—

In this case an application was made to Mr. Justice Dodd to allow service of the writ of summons to be effected by posting; and it appears from the affidavit of Mr. Lundy, of the firm of Messrs. Hayes & Sons, that it was impossible for the reasons therein stated to have the writ served personally. At the hearing before Mr. Justice Dodd there were exhibited two letters from the Minister for Home Affairs. One, dated September 15th, 1923, and addressed to Messrs. Hayes & Sons, was as follows (reads letter). Protection was not afforded, and a subsequent letter was sent by Messrs. Hayes to the Minister for Home Affairs. In answer to that letter they received the following reply, dated November 16th (reads reply). Mr. Justice Dodd, on reading that letter from the Minister for Home Affairs, refused the application; and recites the reason of his refusal in the order as

follows:—"The Court being of opinion that it cannot override the statement of the Minister of Home Affairs, to the effect that he 'did not consider the present state of the country was such as to make it necessary to provide military protection for the service of writs.'"

The application to have service effected through the post is made under Order 9, rule 5, of our Judicature Rules, which is as follows (His Lordship read the rule). Our duty is to administer these rules honestly and fairly between man and man, giving due weight to every statement and every circumstance brought under our notice. We cannot, however, agree with the opinion of Mr. Justice Dodd recited in the order, that he could not override the statement made by the Minister for Home Affairs. The function of a judge is to decide a case according to the statutes and rules, which he is bound to observe; and no statement of a Minister can or ought to affect him in the performance of his judicial duty. On September 15th the Minister for Home Affairs undoubtedly considered it necessary that protection should be given, because on that day he informed Messrs Hayes that "the military have been asked to afford him (the process server) any possible protection whilst engaged in these duties." Two months afterwards, on November 16th, he did not consider that "the present state of the country is such as to make it necessary to provide military protection for the service of writs." What happened between September and November to cause a change in the condition of affairs as regards the service of writs and legal documents? There has been, we are glad to note, a progressive improvement in the condition of the country; but there still are places where it is difficult, if not impossible, to serve writs in the ordinary way. The Government recognised that fact, and provided a special infantry corps to protect civil bill officers; but that corps has now been withdrawn from Galway. Were they withdrawn in consequence of the improvement in the state of the country, or because the necessity for their existence had to a very great extent ceased by reason of the passing by the Oireachtas on the 31st of October, 1923, of the County Courts Amendment Act, 1923 (No. 45 of 1923), providing that the service of civil bills and jurors' summonses be deemed good in certain cases? Section 2 of that Act provides that: "Any County Court Judge may deem any document to which this section applies to have been validly served notwithstanding that the same was not served in the manner required by the law in force at the passing of this Act if the County Court Judge is satisfied (*a*) that it was not reasonably possible to effect service of such document in the manner required by the law aforesaid; and (*b*) that such document or a copy thereof, or reasonable notice of such document and of the contents thereof, did in fact reach the person required to be served therewith." The section applies to: "(*a*) All civil bills, whether ordinary, title, equity, or otherwise; (*b*) all documents summoning or

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requiring the attendance of grand jurors, special jurors, or common jurors, whether for criminal or civil business, at any Court of Quarter Sessions or Civil Bill Court."

The Act is a temporary measure, and will expire on August 31st, 1924. The Act does not refer to the service of writs in the Superior Court, the reason being that the power of the Superior Court to deem service other than personal service good is fully recognised by Order 9, rule 5. It is notorious that when the Act was passed there were cases in which it was not reasonably possible to effect personal service of civil bill processes, and consequently means were provided to deem service good although not effected in manner prescribed by law. The effect apparently of the Act was that it was no longer necessary to maintain the special infantry corps for the purpose of aiding and assisting process servers in the service of civil bills.

Under the practice of the Court leave would be given in this case to serve the writ by posting, and there is nothing to take this case out of the ordinary rule. We are in no way bound by the letter of the Minister of Home Affairs, and we cannot lose sight of the fact that sixteen days before it was written the Legislature, by the passing of the Act to which I have called attention, clearly recognised that there were places in the country where personal service could not be effected.

It should be understood that there is nothing in the letter of the Minister for Home Affairs to the effect that protection will not be given to the civil authorities in the execution of decrees or judgments, whether of the County Court or of the High Court. By a long series of authorities, such as *Miller* v. *Knox* (1), the observations of Palles C.B. in the *Sligo Cases* (2), and the *Attorney-General* v. *Kissane* (3), it has been laid down that it does not depend on the will of the Executive in any shape or form whether a decree or writ of execution issued by a Court of competent jurisdiction is to be executed. In this case the question does not arise. I am sure that, should it arise, the protection of the entire forces of the State will always be given—as it must be given in every civilized community—for the enforcement of judgments and decrees of the civil Courts made under due process of law.

RONAN L.J.*:—

I agree. If this were a matter affecting the exercise of the discretion of so experienced and careful a Judge as Mr. Justice Dodd, I should hesitate before I would interfere with the exercise of that discretion; but this is not a case in which the exercise of the Judge's discretion arises. Mr. Justice Dodd states in his order that he could not override the statement made

(1) 4 Bing, N. C. 574. (2) Judgments of the Superior Courts in Ireland, 23.
(3) 32 L. R. Ir. 220, 255.

* This judgment has not been revised by Ronan L.J.

in the letter of the Minister for Home Affairs. No Executive Minister has any right to limit the jurisdiction of the Court unless express statutory power is given to him for that purpose; and there is no pretence that any statutory power was given to any Minister to interfere with the operation of the rule in question. That being so, I am of opinion that any point as to interfering with the discretion of the Judge below is out of the case. The simple ground on which Mr. Justice Dodd decided the case was that the Court had no power to exercise jurisdiction because of the letter from the Minister for Home Affairs. Prior to the statute of the present year, to which the Lord Chief Justice has referred, there were two Courts—the High Court and the County Court. The High Court had wide power given to it by rule 5 of Order 9 to order substituted service or such other service as it should deem fit. It had been the practice of the Court to order that service be effected through the post. The County Court had no such power; and the statute of October 31 last was passed to confer that power upon the County Court. The High Court is in the same position as it was before the passing of that Act, and its old jurisdiction remains. The question, then, is whether Mr. Justice Dodd was right in holding that the letter of the Minister for Home Affairs has destroyed the jurisdiction of the High Court. No such proposition can be maintained, and the reasons for making the order sought are overwhelming in this case.

Solicitors for the appellants: *Hayes & Sons.*

C. L.

K. B. Div.
(I. F. S.)
1923.

June 1.
July 26.

Re GORHAM, A Bankrupt.

Bankruptcy—Act of bankruptcy—Debtor summons—late service of summons—Order 88, rule 19—Application to annul bankruptcy—Principles applicable—Irish Bankrupt and Insolvent Act, 1857 (20 & 21 *Vict. c.* 60), *sect.* 358.

On the 6th September, 1922, a debtor summons was issued against the bankrupt, and the summons was personally served on the bankrupt on the 29th September, i.e. two days too late under Order 88, r. 19, of the Rules of the Supreme Court of Judicature. No cause was shown against the adjudication, but the bankrupt applied to annul the bankruptcy on the ground that the late service of the debtor summons vitiated the proceedings.

Held, that the condition of bankruptcy prior to the filing of a petition necessarily involved an act of bankruptcy, which the Court should assume was a proper ground for the adjudication.

Motion to Annul Bankruptcy.

On the 6th September, 1922, a debtor's summons was issued against the bankrupt. On the 29th September, 1922, this summons was served personally upon the bankrupt. Order 88, r. 19, requires that a debtor's summons should be served within twenty-one days of the issue thereof, i.e. in the present case on or before the 27th September. In consequence, the summons in this case was served two days late. The debtor did not move to set aside the service of the summons or to dismiss it.

On the 30th October, 1922, Mr. Gorham was adjudicated a bankrupt. Owing to the state of the country, it was found impossible to serve the debtor personally with the duplicate order; but on the 30th January, 1923, in pursuance of an order of the Court, he was served by letter on two different occasions. In his affidavit he admitted he received the notice of adjudication. He did not show cause against the adjudication, as provided by sect. 121 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), and did not appeal against the adjudication within three weeks, in pursuance of Or. 58, r. 9, or Or. 88, r. 3.

On the 1st of June, 1923, the bankrupt applied to the Court to annul the bankruptcy, on the ostensible ground that no act of bankruptcy had been proved, but really on the ground that the late service of the debtor's summons vitiated the whole proceedings, and that therefore the bankruptcy ought to be annulled.

A. F. Blood K.C. and *T. C. Tobias,* for the bankrupt.

F. W. Price K.C. and *W. H. Carson,* for the assignee.

PIM J.:—

An adjudication in bankruptcy changes the status of the person adjudicated, and rights and interests arise with which, except in a very special case, it would be dangerous and wrong to interfere. This present case is an example of the injury that might be done, for if the bankruptcy be now annulled, certain rights arising under a post-nuptial settlement will become effective, and the consequence will be that the creditors will get nothing. That, however, is not in itself a reason for refusing to annul the bankruptcy, but it is a reason why the Court should be slow to do what the bankrupt now asks.

Both Mr. Blood, on behalf of the bankrupt, and Mr. Price, on behalf of the assignee, have referred me to sect. 358 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), and to sect. 10 of the English Bankruptcy Act of 1869 (32 & 33 Vict. c. 71). The section of the Irish Act is as follows (I quote the relevant words only): "If the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication) within one month after the advertisement of the bankruptcy in the 'Dublin Gazette' . . . have commenced a suit to dismiss the petition, or to dispute or annul the adjudication, and shall not have prosecuted the same with due diligence and with effect, the 'Gazette' containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all suits brought by the assignees for any debt or demand for which such bankrupt might have sustained any suit, that such person so adjudged bankrupt became a bankrupt before the date and filing of the petition for adjudication." Sect. 10 of the English Act is as follows: "A copy of an order of the Court adjudging the debtor to be bankrupt shall be published in the 'London Gazette,' and shall be advertised locally in such manner (if any) as may be prescribed, and the date of such order shall be the date of the adjudication for the purposes of this Act, and the production of a copy of the 'Gazette' containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt, and the date of the adjudication."

Mr. Blood, in comparing these two sections, contended that the words, "shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt," made the "Gazette" also conclusive evidence that there had been a legal act of bankruptcy, on the ground that he could not be duly adjudged a bankrupt without such act of bankruptcy; and he further contended that, inasmuch as the Irish section did not contain the word "duly," the Court was not bound to assume that a legal act of bankruptcy had been committed. I cannot agree with counsel's contention. The words of the Irish Act are: "That such advertisement shall be conclusive evidence that such person so adjudged bankrupt became a bankrupt before the

K. B. Div. (I. F. S.) 1923.

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date and filing of the petition for adjudication." To be a bankrupt before the filing of the petition necessarily involves an act of bankruptcy, which the Court must assume to have been proper as a ground for the adjudication. The section further enacts that all suits to annul an adjudication, if brought after the proper time, are to be null and void. The first contention of the bankrupt was that the Court had inherent jurisdiction to annul a bankruptcy, even though the time for appealing had elapsed. It could be argued from the words I have already quoted from sect. 358 of the Irish Act that the Legislature had destroyed this power in the Irish Courts in all cases; but I doubt if the section can be stretched so far. I am prepared to hold that in a proper case in Ireland, as in England, the Court has power, no matter what time may have elapsed, to annul a bankruptcy. The whole question is whether the case is a proper one. In *Ex parte Geisel, In re Stanger* (1), Lord Justice Cotton asked the question, "Does sect. 10 apply at all to an application to annul an adjudication?" but neither he nor any other of the learned Lords Justices who heard the case answered the question. I think, in England, at all events, the question is apt, and I wish it had been answered. In any event, whether the answer be in the affirmative or negative, the section cannot be neglected by the Court when the question whether the case is a proper one for amendment is before it. One case, and one case only, of the annulment of a bankruptcy after the time for appealing had gone by has been quoted to me; it is the case of *Ex parte Geisel* (1), to which I have already referred. In that case a bankruptcy petition had been presented on the ground that the bankrupt had absented himself from his dwelling-house with intent to defeat and delay his creditors. Some time after the adjudication an application was made to the Probate Division to grant probate of a will executed by the bankrupt, and the Division presumed him to have been dead on and since a date anterior to the bankruptcy petition. The Lords Justices annulled the bankruptcy on the ground that they were not satisfied that the bankrupt was alive at the date of the alleged act of bankruptcy. This seems to me to have been a proper case for the exercise of the inherent jurisdiction of the Court. A dead man cannot commit an act of bankruptcy; neither can he be adjudicated a bankrupt.

The only other cases that occur to me are those in which a bankruptcy had been obtained by fraud, or where the bankruptcy was an abuse of the process of the Court: see *Ex parte Painter, In re Painter* (2). But when the cases in which such applications have been refused are looked at, the matter becomes, to my mind, entirely free from doubt. In the case of *In re West* (3) the bankrupt was a minor, and at that time a minor could not be made a bankrupt unless he had fraudulently concealed or misstated his age. This the bankrupt had not done. The Court

(1) 22 Ch. D. 436.
(2) [1895] 1 Q. B. D. 85.
(3) 3 De G. McN. & G. 198.

refused to annul the bankruptcy. In *Ex parte French, Re Trim* (1) the Court of Appeal held that the proved insufficiency of the petitioning creditor's debt was not a reason for annulling a bankruptcy. And in *In re Johnson, Ex parte Wigg* (2) Sir James Bacon, it being alleged that the bankrupt was not a trader, and therefore could not be adjudicated, refused to consider the question of whether he was a trader or not, and declined to annul the adjudication after it had been advertised in the "Gazette" in the usual way and the time had elapsed.

In all these cases the complaint made was a matter of substance. In the case before me it is, at most, a matter of procedure. It seems to me to be much less strong than any of the three cases I have quoted. As a result I am satisfied that I should not annul the present bankruptcy. The application therefore fails, and must be dismissed with costs.

Solicitors for the bankrupt: *Molloy, Fayle, & Co.*
Solicitor for the assignee: *Plunkett Kenney.*

C. N. K.

(1) 52 L. J. Ch. 48.

(2) 12 Ch. Div 905.

BIBL. LONDON UNIV.

Appeal.
(N. I.)
1923.

Dec. 14, 17.
Dec. 21.

HENRY MERCER AND JOHN F. SMYTH *v.* JOHN MERCER AND ROBERT MERCER (1).

(1923. No. 1.)

Practice—New trial—Improper admission of evidence—Action to have will established—No substantial wrong or miscarriage—R.S.C. (Ir.), 1905, Or. 39, r. 7.

The plaintiffs brought an action to establish a will. At the trial evidence was tendered and admitted on behalf of defendant of a memorandum made by a deceased partner in a firm of solicitors giving details of an interview with the deceased. The jury found a verdict for the defendants. On motion for a new trial:

Held by the Court of Appeal, N.I. (Sir Denis Henry, Bart., C.J., Moore and Andrews L.JJ.), that the memorandum was not admissible as independent evidence of facts recorded therein, but that there was evidence without it sufficient to sustain the verdict, and that the defendant had discharged the onus of showing that no substantial wrong or miscarriage had resulted from its admission, and accordingly that the verdict should stand. *Tait* v. *Beggs* ([1905] 22 I.R. 525) followed.

NEW TRIAL MOTION.

The plaintiffs applied for a new trial (inter alia) on the ground that the findings of the jury were based upon evidence which was illegal and improper, and should not have been admitted.

The action was tried before Brown J. and a common jury on June 20th and 21st, 1923.

Mr. Francis Anderson, solicitor, former partner of Mr. Monroe C.S., stated that he was present on 12th March, 1917, when deceased and defendant, Robert Mercer, came in to see Mr. Monroe. Robert Mercer said they had come to make a new will. "Haven't you, uncle?" Uncle (the deceased) assented by nodding. Mr. Monroe asked him a question. He did not reply, but looked at his nephew. Mr. Monroe fetched the will. Robert said, "Take it, and see if it was his." Mr. Monroe showed him the signature. The old man tore it up and threw it on the fire. Mr. Monroe said he would not make a will for him unless he was left alone with him. Robert refused to leave. Robert said when he came in, that he had instructions for a new will written out in his pocket. Mr. Monroe told them both that he had made the previous will, relying mainly on Mr. Brown, whom he had known for twenty years, and believing it was a family settlement, and that everyone was satisfied; but that if there was any dispute he would not be prepared to swear that the testator was of testamentary capacity. Then Robert told his uncle to come away, and they left. Mr. Monroe then wrote down on a slip of paper what had occurred, and signed it and showed it to me. [This

(1) In the Court of Appeal (N.I.), before SIR DENIS HENRY, Bart., C.J., and MOORE and ANDREWS L.JJ.

memorandum, made by Mr. Monroe, was offered in evidence.] R. Best K.C., Attorney-General (N.I.), for the plaintiffs, objected. His Lordship admitted the document, subject to objection. The jury found—1, that the will dated 12th March, 1917, and codicil dated 16th July, 1919, were duly executed, but that at the time of their execution the deceased was not of sound mind, memory, and understanding, and that the deceased did not know and approve of the contents thereof.

The plaintiffs applied for a new trial to the Court of Appeal (1).

Babington K.C., E. S. Murphy K.C., and *M'Guckin,* for the plaintiffs :—

The evidence was wrongfully admitted, and the document must have affected the wavering minds of the jury. This document was vital on the point of testamentary capacity. Mr. Anderson was testifying to a scene which had happened seven years before, and of which he had no personal knowledge. In order to be admissible after the death of the party who made it, the memorandum must have been made in the course of some professional duty: *Hope* v. *Hope* (2).

[HENRY C.J.: Suppose that it was attempted to prove this will as a last will, on the ground that the testator was insane when the will was destroyed?]

Babington K.C.: That does not arise here. The admission of documents of this sort ought to be kept within reasonable bounds. *Kerin* v. *Davoren* (3) established the principle of no duty. In *Smith and Others* v. *Blakey* (4) it was held that the duty must be to do the particular thing to which the entry relates. We submit that there was no duty here on the part of Mr. Monroe to record any fact with relation to the particular interview, except perhaps the fact of the return of the will (afterwards destroyed) to the client, and this could have been done by taking a receipt. The duty must be one that the solicitor owes to his client: *Trotter* v. *MacLean* (5), *Massey* v. *Allen* (6), Hall V.-C., at p. 563. This memorandum was not made either for purpose of business or in pursuance of a duty to a client. Mr. Anderson could not have written that document himself, as there were things in it of which he had no knowledge. This was really hearsay evidence, and can only be admitted on some well-known rule of law: *The Henry Coxon* (7), *Sturla* v. *Freccia* (8). Once the will had been returned, Mr. Monroe's

(1) In the Court of Appeal (N.I.), before SIR DENIS HENRY, Bart., C.J., and MOORE and ANDREWS L.JJ.

(2) [1893] W. N. 20.
(3) 12 Ir. Ch. R. 352.
(4) L. R. 2 Q. B. 326.
(5) 13 Ch. D. 574.
(6) 13 Ch. D. 558.
(7) 3 P. D. 156.
(8) 5 A. C. 623.

Appeal. (*N. I.*) 1923.

MERCER AND SMYTH *v.* MERCER.

retainer was at an end: *Reg.* v. *Worth* (1). This is a document which purports to enter up an opinion: *Chambers* v. *Bernasconi and Others* (2).

There is also the question whether the discretion given by Or. 39, r. 7, can be exercised in favour of a verdict found, although evidence has been illegally admitted. The onus is upon the persons who were successful in getting illegal evidence admitted to show that it did not affect the course of the trial: *White* v. *Barnes* (3); *Anthony* v. *Halstead* (4); *Bray* v. *Ford* (5). The anxiety of defendants to have this document admitted is the strongest testimony to its materiality. Before the Court can exercise their discretion in favour of defendants, they must be satisfied that, apart from the illegal evidence, the Court could only have found against the will. [They also referred to *Mercer* v. *Denne* (6); *Davis* v. *Lloyd* (7).]

M'Gonigal K.C., *Williamson K.C.*, and *J. C. Davison*, for defendant, John Mercer:—

It is only necessary that the entry should be made in pursuance of some duty: so in *Massey* v. *Allen* (8), *Chambers* v. *Bernasconi and Others* (2). Mr. Monroe was entitled as an officer of the Court of Probate to draw up that memorandum to protect his client and to protect himself; it was his duty to make it, especially where a will had been destroyed and another was intended to be drawn up. He had a duty to the old man, his client, who was in an unfit state to revoke one will or to make another. In *Rawlins* v. *Rickards* (9) entries in a deceased solicitor's books in his handwriting relating to a deed prepared by him and executed by a deceased client were held good evidence. Entries made in regular course of business and duty are admissible: *Doe, dem., Patteshall* v. *Turford* (10). Even if this document were not evidence, the verdict should stand under Or. 39, r. 7. On the question of substantial wrong or miscarriage, we rely on *Tait* v. *Beggs* (11). We also rely on *Tyrrell* v. *Painton* (12), and on *Bray* v. *Ford* (5).

C. S. Campbell, for the defendant, Robert Mercer.

Cur. adv. vult.

Dec. 21.

SIR DENIS HENRY, BART., C.J., delivered the judgment of the Court as follows:—

This was an action brought by Henry Mercer and John F. Smyth, two of the executors named in an alleged will of William Mercer, late of Caledon, in the County of Tyrone, merchant,

(1) 3 Ad. & El. N. S. 132.
(2) 1 C. M. & R. 347.
(3) [1914] W. N. 74.
(4) 37 L. T. 433
(5) [1896] A. C. 44.
(6) [1905] 2 Ch. 538.
(7) 1 Car. & Kir. 275.
(8) 13 Ch. D. 558.
(9) 28 Beav. 370.
(10) 3 B. & Ad. 890.
(11) [1905] 2 I. R. 525.
(12) [1894] Prob. Div. 151.

deceased, who died on the 19th December, 1922, to have the said alleged will, dated 12th March, 1917, and a codicil dated 16th July, 1919, established. The defendant, Robert Mercer, was also an executor, and both Robert and John, the co-defendant, were nephews of the deceased. The pleas were the three usual ones, and there was no plea of undue influence. The case was heard before Brown J. and a common jury at Belfast on the 20th and 21st June, and resulted in a verdict for the plaintiffs of due execution according to the statute, but it was found that there was no testamentary capacity and no knowledge and approval. The learned Judge gave judgment condemning the will and codicil, and an application has been made to us for a new trial. The grounds of this application in the end were improper admission of evidence. It was contended on behalf of the defendant, John Mercer, who alone contested the case, that the evidence complained of was properly admitted; and Mr. M'Gonigal further contended that even if the evidence were improperly admitted, there should be no new trial ordered, in view of the provisions of Or. 39, r. 7. [His Lordship read the rule.] It will be noticed that the rule prohibits the granting of a new trial on the ground of improper admission of evidence unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned at the trial. We have therefore to consider two questions: 1, was the evidence objected to improperly admitted; and 2, should a new trial be granted in view of Or. 39, r. 7. The evidence objected to consisted of a document in the handwriting of the late T. H. Monroe, solicitor, which was written out by him on the 12th March, 1917, the day the alleged will was executed. It appeared that the deceased and Robert Mercer, the defendant, came into Mr. Monroe's office, and what took place is fully described in the evidence of Mr. Monroe's partner, Mr. Anderson. [His Lordship read the evidence of Mr. Anderson.] The document could have been used by Mr. Anderson to refresh his memory: *Duchess of Kingston's Case* (1); but in our opinion the admission of the document as independent evidence was not in accordance with the authorities, and I therefore proceed to deal with the second question, as to the operation of Or. 39, r. 7.

The evidence of Mr. Anderson established that on March 12, 1917, the deceased and Robert Mercer came into the office of the firm, and Robert said they had come to make a new will. "Haven't you, uncle?" Immediately after this interview, at which Mr. Monroe had refused to make a new will, and at which the testator, as sworn by Mr. Anderson, was incompetent, the old man finds his way to Castleblayney, and a will is drawn up by Mr. Smyth, one of the plaintiffs, who was Robert's solicitor, and Robert, in addition to benefits given to his children, got thereunder estate worth about £3,000. I am very much impressed by the way the case has been brought into Court, and the

(1) 2 Smith's L. C. (11th edition), 731.

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bearing of this on Mr. Anderson's evidence is most important. Robert was most vitally interested in upholding the will, as on an intestacy there are eleven or twelve next-of-kin sharing equally. He enters a caveat against the will of which he was executor, which he was instrumental in getting prepared, and under which he and his family benefited, and he appears at the trial as a defendant and also here, though obviously anxious to have the will proved. Why was that done? In my opinion the advisers of the plaintiffs and of Robert were anxious not to call Robert, and they hoped by making him a defendant to escape this, and the case closed with a principal witness kept out of the box. The incidents to which Mr. Anderson referred took place in presence of four persons—two dead and two surviving (Robert and Mr. Anderson); and the evidence of the latter, powerfully against the will, is given in Robert's presence, and he allows it to go by default. Mr. Anderson's evidence therefore, though capable of contradiction if untrue, is uncontradicted; and what other verdict could be found in these circumstances? Every material matter in the memorandum of Mr. Monroe appears in Mr. Anderson's evidence, and in addition he gives his own opinion as to the capacity of the testator, and proves that Robert, who had stated he had a will in his pocket, refused to leave the room.

In my opinion no substantial wrong or miscarriage was occasioned at the trial by the admission of this evidence.

MOORE L.J.: I concur with the Lord Chief Justice.

ANDREWS L.J.: I concur with the Lord Chief Justice.

Solicitor for the plaintiffs: *John F. Smyth.*

Solicitors for the defendant, John Mercer: *Joshua A. Peel & Son.*

Solicitor for the defendant, Robert Mercer: *John G. Reid.*

J. M'C.

REX (ELIZA JANE GREENAWAY) *v.* JUSTICES OF ARMAGH (1).

(1923. No. 48.)

Appeal.
(*N. I.*)
1924.
Jan. 17.
Jan. 21.
Feb. 4.

Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 162—*Order of Justices authorizing entry on lands to make and cleanse drains—Decision of Justices that the lands are not an orchard not conclusive—Certiorari—Right of entry not limited to a definite time—Validity—Jurisdiction of Court of Appeal in Northern Ireland.*

An order made under sect. 162 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), by which Justices had authorized drains to be made by the county surveyor, was quashed on certiorari by the King's Bench Division, on the ground that the proposed drains would draw off water from a lake rather than from a flooded road, and were works not contemplated by the statute. The order for certiorari was affirmed by the Court of Appeal, that Court holding on the evidence that the land through which the drains were to be made constituted an orchard within the exception to sect. 162.

Where the jurisdiction of an inferior Court depends upon a fact collateral to the actual matter which that Court has to try, it cannot by a wrong decision with regard to that fact give itself jurisdiction which it would not otherwise possess. The lower Court must decide as to the collateral fact in the first instance, but the superior Court may upon certiorari inquire into the correctness of that decision. *Rex* (*de Vesci*) v. *Justices of Queen's County* ([1908] 2 I.R. 285) and *Rex* v. *Bradford* ([1908] 1 K.B. 365) approved. *Rex* (*Darcy*) v. *The Justices of County Carlow* ([1916] 2 I.R. 313) disapproved.

An order of Justices authorizing a county surveyor to enter upon lands for the purpose of making drains is not bad on its face, because it does not specify a definite time limit. *Reg.* (*Bentham*) v. *Justices of County Dublin* (14 L.R.I. 443) overruled. *Rex* v. *Adams* ([1923] 1 K.B. 415) followed.

The Court of Appeal of Northern Ireland has jurisdiction to reconsider decisions of the late Supreme Court of Appeal in Ireland, but this jurisdiction should be sparingly exercised.

APPEAL on behalf of the County Council of Armagh from an order of the King's Bench Division (N.I.) making absolute a conditional order for a writ of certiorari to quash an order made by Justices at Petty Sessions on the 7th May, 1923, granting an application by the County Council of Armagh for an order under sect. 162 of the Grand Jury Act, 1836 (6 & 7 Wm. 4, c. 116), to enter certain lands in the occupation of Eliza Jane Greenaway to make and cleanse drains therein.

The following statement of the facts is taken from the affidavit of the prosecutor:—

The lands [through which it was sought to make drains] are an orchard, and as such are kept and maintained by me. The orchard consists of twenty-nine apple trees and four damson trees and a number of currant and gooseberry bushes on the one side of the proposed drain, and twelve apple trees, eighteen damson

(1) In the Court of Appeal (N.I.), before MOORE and ANDREWS L.JJ.

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trees, and one pear tree on the other side, covering one-half acre, and the trees are in good order and full bearing.

The prosecutor, in her affidavit, prayed for an order of certiorari to bring up the order made at Petty Sessions on 19th June, 1923, for the purpose of quashing it on the grounds that (*a*) the order was made without jurisdiction and in excess of jurisdiction; (*b*) the order was bad on its face, (i) as it gave power to complainants to make and cleanse drains, and (ii) as there was no time limit on the duration of the authority thereby given; (*c*) the lands, the subject-matter of the order, are an orchard; (*d*) the order is bad for uncertainty and ambiguity.

The county surveyor, on the hearing before the Justices, deposed that there was no orchard on the west side of the drain, and that the drain was not to go in or through any orchard.

The King's Bench Division, N.I. (Sir D. S. Henry C.J. and Brown J.), held that certiorari should be granted on the ground that the proposed work was not contemplated by the statute, as the drain would draw off water from Derryadd Lake rather than from a flooded road, which would receive only an indirect benefit.

The County Council of Armagh appealed to the Court of Appeal of Northern Ireland (1).

Murphy K.C. and *J. C. Davison,* for the County Council of Armagh :—

This is not an orchard; it is not an enclosure for the purpose of cultivation of fruit trees. There is no legal authority for the proposition that a scattered collection of apple trees constitutes an orchard for the purpose of sect. 162 of the Grand Jury (Ireland) Act, 1836. As to what constitutes an orchard, see *Rex* (*de Vesci*) v. *Justices of Queen's County* (2), and especially the judgment of Lord O'Brien C.J. at pp. 300–301. That case is wholly different from the present one, and in any case is not binding on this Court. We rely on *Rex* (*Darcy*) v. *The Justices of County Carlow* (3).

A time limit, we submit, is quite unnecessary. The chain of cases, beginning with *Reg.* (*Bentham*) v. *The Justices of the County of Dublin* (4), and also including *Reg.* (*Murphy*) v. *Justices of Wexford* (5), *Reg.* (*Fitzgerald*) v. *The Justices of Limerick* (6), and *Reg.* (*Guinness*) v. *Justices of Louth* (7), is of very doubtful validity, and in any case is not binding on this Court. This is, we believe, the first time the question has come before a Court of Appeal.

(1) In the Court of Appeal (N.I.), before MOORE and ANDREWS L.JJ.
(2) [1908] 2 I. R. 285.
(3) [1916] 2 I. R. 313.
(4) 14 L. R. I. 443.
(5) [1894] 2 I. R. 81.
(6) 27 I. L. T. R. 35.
(7) [1898] 2 I. R. 248.

[They also referred to:—*Rex* (*Holmes*) v. *Justices of King's County* (1); *Rex* (*Conroy*) v. *Justices of County Dublin* (2); *Reg.* v. *Dayman* (3); *Rex* v. *Adams* (4).

Babington K.C. and *Sheil*, for the prosecutor:—

In order to get rid of the water, which might injure the road, it is sought to compel us to have a drain cut through our premises. This would impose on us a very much greater burden than was contemplated by the statute. If there was a bona-fide orchard in existence, the magistrates had no jurisdiction to make this order, and in any case the decision of the magistrates on this preliminary and collateral matter is not conclusive: *Rex* v. *Bradford* (5) *and Rex* (*de Vesci*) v. *Justices of Queen's County* (6). On the question of the time limit, it would be a very strong course for this Court to overrule a long line of cases, beginning with *Reg.* (*Bentham*) v. *The Justices of the County of Dublin* (7), which have been accepted as law for forty years. We submit on the authorities that the order is bad, as it does not contain a time limit: *Reg.* (*Murphy*) v. *Justices of Wexford* (8); *Reg.* (*Fitzgerald*) v. *The Justices of Limerick* (9); *Reg.* (*Guinness*) v. *Justices of Louth* (10). The decision in *Rex* (*Darcy*) v. *The Justices of County Carlow* (11) was given apparently after a very partial examination of the authorities. We submit that the true view was that taken by the King's Bench Division in Ireland in *Rex* (*de Vesci*) v. *Justices of Queen's County* (6), and by the King's Bench Division in England in *Rex* v. *Bradford* (5). The question whether there is or is not an orchard is preliminary to jurisdiction, and the Court is entitled to look into the evidence given.

Feb. 4.

MOORE L.J.:—

This case came before us by way of appeal from an order of the King's Bench Division, directing certain proceedings before the Armagh Justices to be removed into the King's Bench for the purpose of being quashed.

The matter in dispute came before the magistrates sitting at Clonmacate Petty Sessions, Co. Armagh, on May 7th, when the county surveyor applied to them for an order against the defendant, Mrs. Greenaway, under sect. 162 of the Grand Jury (Ireland) Act, 1836, authorizing him to make drains through her lands for the purpose of relieving flooding on a public road.

Mrs. Greenaway contended that the intended drain would pass in or through an orchard, her property, and that consequently the Justices had no jurisdiction to make any order.

(1) 4 N. I. J. 22.
(2) 44 I. L. T. R. 231.
(3) 7 E. & B. 672.
(4) [1923] 1 K. B. 415.
(5) [1908] 1 K. B. 365.
(6) [1908] 2 I. R. 285.
(7) 14 L. R. Ir. 443.
(8) [1894] 2 I. R. 81.
(9) 27 I. L. T. R. 35.
(10) [1898] 2 I. R. 248.
(11) [1916] 2 I. R. 313.

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The Justices found that the drain would not pass in or through an orchard, and made an order in the following terms :— [His Lordship read the order.]

Mrs. Greenaway applied in the King's Bench Division for a conditional order to bring up the magistrates' order on certiorari, and eventually—after cause shown and disallowed—the King's Bench Division made the present order appealed from.

Before us three grounds against the order were relied upon: 1, that the order was bad on its face, as it contained no time limit for the performance of the works authorised; 2, that, inasmuch as in fact the lands were an orchard, the Justices had no jurisdiction to make the order; and 3, that the proposed works were really not drainage of water from the road, but drainage of Derryadd Lake, near the road—a work not contemplated by sect. 162.

The first question for us is, is the order bad on its face in respect of the absence from it of any time limit? A number of cases is collected in O'Connor's Justice of the Peace, 2nd ed., vol. i, at p. 215, in support of the proposition that the order is bad for want of a time limit. There are, however, no express words in sect. 162 making this necessary. How far is it a necessary implication from the true construction of the section? The first case decided on this point in Ireland was *R.* (*Bentham*) v. *Dublin Justices* (1). On reading the report it will be seen how unsatisfactory that case is; no judgments are given, merely the effect of the order. The decision in *Bentham's Case* (1) has on subsequent occasions come frequently before the King's Bench Division; but, though the Judges have often expressed their doubt, they have held themselves bound to follow it until reversed in the Court of Appeal. In *Reg.* (*Murphy*) v. *Justices of Wexford* (2), Sir P. O'Brien C.J. stated that the decision in *Bentham's Case* (1) "took him by surprise, and he rather hoped there might have been an appeal," p. 89; in *R.* (*Guinness*) v. *Justices of County Louth* (3), Gibson J. says of *Bentham's Case* (1): "If the point is to be reconsidered, it must be considered, not in this Court, but in the Court of Appeal." Murphy J. refused to admit that *Bentham's Case* (1) applied, but proceeded to deliver a judgment in effect condemning it.

The decision, however, in *Bentham's Case* (1) appears to be solely grounded upon the only authority referred to, *Earl Manvers* v. *Bartholomew* (4). As I understand the judgments in that case upon a corresponding statute in England, they merely amount to this, that the order—therein called a licence—is not to be a general or perpetual authority over successive operations, but in protection of the subject should be so restricted in its effect that it will be limited to each individual work authorised for the actual application. For every fresh work there must be an application. This view is further borne out by the decision

(1) 14 L. R. I. 443.
(2) [1894] 2 I. R. 81.
(3) [1898] 2 I. R. 248, at p. 250.
(4) 4 Q. B. D. 5.

in *R.* v. *Adams* (1), to which Mr. Murphy has referred us, in which *Manvers* v. *Bartholomew* (2) is thus explained. What view of this question was taken by the King's Bench Division in Northern Ireland does not appear; following a long line of precedent, that Court would probably have considered itself bound to follow *Bentham's Case* (3), but now for the first time that case has in effect reached the Court of Appeal, though in Northern Ireland, and we must deal with it. I am of opinion that the absence of a time limit from the order before us does not invalidate it in any way, and that we must overrule the law as laid down by the decision in *Bentham's Case* (3).

The second question for our determination is whether or not we are empowered to go behind the magistrates' order, purporting on its face to be regular, to inquire if it was in fact made without jurisdiction; and on this most of the argument before us has been maintained. It is conceded that if the lands of the defendant were in fact an orchard, the order should not have been made. But how far is the magistrates' determination on this conclusive, so that we cannot examine into or interfere with their decision?

The head-note in the case of *R.* (*de Vesci*) v. *The Justices of Queen's County* (4) runs thus: "It is a condition precedent to the jurisdiction of Justices to make an order under sect. 162 . . . that the lands are not an orchard; and their decision that it is not an orchard may be challenged on certiorari, not merely on the ground that there was no evidence to support it, but also with reference to the weight of evidence." This correctly represents the judgments of Lord O'Brien C.J. and Gibson J. *R.* v. *Bradford* (5) is referred to in the judgment of Gibson J. A similar case had previously been decided by the Court in *R.* (*Holmes*) v. *Justices of King's County* (6), though this case does not appear in the authorised reports. But the ratio decidendi is this—that where the subject-matter of the application is within the jurisdiction of the Justices the Court will not interfere, even if they go wrong in fact; but where there is of necessity a preliminary inquiry—or, as it has been called, "a collateral inquiry" on which the Justices must find, to give themselves jurisdiction to deal with the application—certiorari will undoubtedly lie to review their decision on such preliminary point.

As Cockburn C.J., in *Reg.* v. *Russell* (7), says: "The rule on which this Court acts as to summary convictions by magistrates is that it looks to see whether there was foundation for their jurisdiction—that is, whether they had a right to enter on the inquiry; once it is found they had, this Court will not take it on itself to determine whether it would have come to the same conclusion," &c. Such is clearly a preliminary or collateral matter

(1) [1923] 1 K. B. 415.
(2) 4 Q. B. D. 5.
(3) 14 L. R. I. 443
(4) [1908] 2 I. R. 285.
(5) [1908] 1 K. B. 365.
(6) 4 N. I. J. 22.
(7) 10 B. & S. 117.

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quite distinct from the main duty of the magistrates, which in the present case is to satisfy themselves before granting authority that they are following the proviso in sect. 162: "Provided nevertheless that it shall not be lawful for any such contractor or surveyor to enter any land for any such purpose against the will of the occupiers thereof without the previous order of a Justice of the Peace, which order any such Justice is hereby authorised and required to grant on its being proved to his satisfaction that . . . such drain cannot otherwise be sufficiently made or cleansed."

The Irish cases I have mentioned were followed by a case in England, to which I have already referred, *R.* v. *Bradford* (1), which to me seems to be indistinguishable from the present one. In that case the Justices had authorised entry into a park for purposes similar to some of those in sect. 162. They had no jurisdiction to make any such order if the lands were in fact a park. The Justices purported to find that they were not a park. The head-note runs as follows: "Held, 1, that the question whether the land was a park or not was one preliminary to the exercise of the jurisdiction given by the statute, and that the Justices could not by wrongly deciding that the land was not a park give themselves jurisdiction in the matter." This is almost verbatim the judgment of Channel J., at p. 372. At p. 373 Bray J. observes: "Therefore the Justices must first of all inquire whether the place is a park or not. But that inquiry is not in the course of the exercise of the jurisdiction, but as a preliminary to it. The case therefore falls within the rule laid down in *Bunbury* v. *Fuller* (2); and the Justices' decision upon the matter is open to review. That being so, I agree with Channel J. that upon the evidence we ought to find that the place was in fact a park." Sutton J. concurred. The Court allowed certiorari to bring up and quash the licence on the ground that it was a preliminary matter, going to the foundation of jurisdiction, into which the Court had power to inquire, and to prevent injustice to any ordinary subject would inquire.

Following these judgments, and also the views of O'Brien C.J. and Gibson J. in the cases to which I have already referred, I am of opinion that the question whether or not defendant's lands constituted an orchard was a preliminary or collateral inquiry, and therefore that certiorari lies. But now comes the remaining difficulty. The identical question came before the Court of Appeal in Ireland in 1915 in the case of *Rex* (*Darcy*) v. *The Justices of County Carlow* (3), where the Court, affirming the King's Bench Division, though on different grounds, refused to grant a certiorari to quash their order on the ground that the magistrate having heard the evidence and determined the question of fact that the field was not an orchard, there was no jurisdiction to review his determination. In the King's Bench

(1) [1908] 1 K. B. 365. (2) 23 L. J. (Ex.) 29. (3) [1916] 2 I. R. 313.

Division, Madden J. referred to *R.* v. *Bradford* (1), but it does not appear to have been mentioned in the Court of Appeal, either in the arguments or judgments. Sir Ignatius O'Brien C. expressly held (p. 324) that the inquiry into whether the lands were or were not an orchard was not a collateral matter. He said: "There is a class of case undoubtedly in which, in order to give jurisdiction, certain collateral conditions must exist; but to my mind this case does not come within that category. The Justices have power to make an order enabling the contractor, against the will of the owner, to enter into lands not being of a certain class. Therefore, in order to make a valid order, the Justices are bound to consider, not as a preliminary matter, but as of the substance of the case, whether the lands in respect of which the order is sought do or do not come within the exception; and the person applying for the order is bound to satisfy them that the lands do not come within the exception." And again, at p. 326: "The question then being one which, as Lord Campbell says, the magistrate was bound to hear and adjudicate upon, and not being a collateral matter, but part and parcel of the question to be determined in order to make an order, and the magistrate having heard and adjudicated upon it, it would be wrong for this Court to take on itself the function of a Court of Appeal to redetermine a question of fact, the determination of which is vested by the section in the Justice." The Court therefore dealt with the case on the lines of *Reg.* v. *Dayman* (2), which, after all, only amounts to a decision, in which we all concur, that where matters are left by statute to the decision of the magistrate, other than preliminary or collateral issues, the Court will not review that determination, no matter how he has acted, if within his jurisdiction. Of course I treat *Dayman's Case* (2) with respect. The majority of the Court held where the statute empowered the Justice to apportion a sum on frontages in "a new street," that a finding upon the question whether it was or was not a new street was not a preliminary or collateral question, but one going to his whole jurisdiction, and that they could not review it. But in the light of subsequent authorities, for myself I prefer the judgment of the dissenting Judge, Erle J., who held that the decision by the magistrate was of a fact going to his jurisdiction, and that the Court could therefore review it. Accepting, however, the decision of the majority of the Court on the construction of that particular statute, that case is at once distinguishable from the Irish cases and *R.* v. *Bradford* (1); and, further, unless *Dayman's Case* (2) is governed by like considerations as *R.* (*Darcy*) v. *The Justices of County Carlow* (3), it is not an authority for the judgments in the latter. It will be noted that in *R.* (*Darcy*) v. *The Justices of County Carlow* (3), *R.* v. *Bradford* (1) was not referred to, that the reference to *Dayman's Case* (2) came from the Bench, and that the judgments were

(1) [1908] 1 K.B. 365. (2) 7 E. & B. 672. (3) [1916] 2 I. R. 313.

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delivered without any period for consideration. Speaking for myself, I prefer the previous Irish cases and *R.* v. *Bradford* (1). It has been urged that we are bound by a decision of the late Court of Appeal, as being its successor, so far as Northern Ireland is concerned, to hold that this question of orchard or no orchard is not preliminary.

In the King's Bench Division in Ireland it was formerly possible to review a previous decision by calling together all the Judges for its reconsideration; a similar practice prevailed in the Court of Appeal: see Molony C.J. in *Leyburn* v. *Armagh County Council* (2). My colleague and I are the only possible members of this Court, as the appeal comes from a Court presided over by the Lord Chief Justice. The late Court of Appeal on several occasions refused to follow its previous decisions: *Milligan* v. *Mayor of Londonderry* (3), where *Bell* v. *King's County County Council* (4), decided ten years previously, was not followed. It is obvious that this is a jurisdiction which should be sparingly exercised. Justice should not depend on the length of the Lord Chancellor's foot; but, having given the whole case my best consideration, I am not prepared to follow *R.* (*Darcy*) v. *Justices of County Carlow* (5). Therefore, looking at the facts in the case, both as sworn to before the Justices and on affidavits in this Court—for on a preliminary matter, at any rate, I have regard to both—there was in my opinion such a collection of fruit trees on defendant's lands as constituted "an orchard" within the standard or ordinary meaning of the word, and therefore within the meaning of sect. 162: see *R.* v. *Bolton* (6). It is true that there was no enclosure; but it appeared that the whole holding was only one and a half acres, including a house. I do not feel called on to decide whether the row of trees on the left hand side of the drain, if they stood by themselves, and so far as they are not confronted or adjoined by other fruit trees, constitute an orchard; but from the moment that they meet with the trees that are called an orchard by one of the deponents then I think the drain runs in and through the orchard.

If, then, we set aside the finding of the Justices, on the inquiry preliminary or collateral to their jurisdiction to make any order, viz., that the lands in question were not an orchard, they have not thereafter jurisdiction to make the order complained of, and it should be quashed.

It is not necessary for me to deal with the third branch of the case, as the defendant has succeeded on the question of orchard; and I think, for the reasons given, the order of the King's Bench Division should be affirmed with costs.

(1) [1908] 1 K. B. 365.
(2) [1922] 2 I. R., at p. 60.
(3) [1920] 2 I. R. 1.
(4) [1910] 2 I. R. 25.
(5) [1916] 2 I. R. 313.
(6) 1 Q. B. 66.

ANDREWS L.J. :—

The first ground upon which the order of the Justices is challenged is that the lands upon which it confers a right of entry in favour of the county surveyor are an orchard. This raises the preliminary legal question which has been principally debated before us as to the power of this Court to review the decision of the magistrates on what is alleged to be purely a question of fact.

Certain legal principles relevant to this issue are, I think, too well settled to admit of serious contradiction. Certiorari will always lie to quash the proceedings of an inferior Court which has acted without jurisdiction. Such absence of jurisdiction may arise by reason of the nature of the subject-matter depriving the inferior Court of any authority to enter on the inquiry. Jurisdiction may, in other words, depend, as in my opinion it does in the present case, upon the existence of some particular fact. An erroneous decision of an inferior Court on such a question of fact can always be reviewed by the King's Bench Division and by this Court. Indeed, one of the most important duties of the King's Bench Division is to control the acts of subordinate tribunals and to restrict the exercise of their jurisdiction within authorised legal limits. In a recent case in this Court, *Crawford* v. *Tyrone County Council* (1), in dealing with this branch of the law, I quoted with approval a passage from Halsbury, vol. x, pp. 193–4, which appears to me to be based on sound principle and authority. If the fact upon which the jurisdiction of an inferior Court depends be collateral to the actual matter which that Court has to try, it cannot by a wrong decision with regard to it give itself jurisdiction which it would not otherwise possess. The lower Court must, no doubt, decide as to the collateral fact in the first instance, but the superior Court may upon certiorari inquire into the correctness of the decision, and may quash the proceedings in the lower Court if such decision is erroneous, or at any rate if there is no evidence to support it. On the other hand, if the fact in question be not collateral, but a part of the very issue which the lower Court has to inquire into, certiorari will not be granted, although the lower Court may have arrived at an erroneous conclusion with regard to it. This view of the law is entirely supported by the judgment of Coleridge J. in *Bunbury* v. *Fuller* (2): "It is a general rule," he says, "that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry whether some collateral matter be or be not within the limits, yet upon this

(1) Unreported.

(2) 23 L. J. (Ex.) 29, at p. 35.

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preliminary question its decision must always be open to inquiry in the superior Court."

The difficulty in each case is, as pointed out by Channell J. in *Rex* v. *Bradford* (1), to ascertain whether the particular question is a preliminary one, or whether in deciding it the Justices are in fact exercising the jurisdiction given to them by the statute. We are not without authority to guide us in the present case. Thus in *Rex* v. *Bradford* (1) the magistrates held that certain land in respect of which they made an order of entry for materials was not a park within sects. 53 and 54 of the Highway Act, 1835, which correspond with sect. 162 of the Irish Grand Jury Act, 1836, under which the county surveyor made his application at Petty Sessions in the present case. The English King's Bench Division held that the question whether the land was a park or not was preliminary to the exercise of the jurisdiction given by the statute, and that the Justices could not by wrongly deciding that the land was not a park give themselves jurisdiction in the matter. The inquiry, as Bray J. put it, whether the place was a park or not was not in the course of the exercise of the jurisdiction, but preliminary to it.

The Irish Court of King's Bench, consisting of Lord O'Brien C.J. and Gibson J., arrived at the same conclusion in *Rex* (*de Vesci*) v. *The Justices of Queen's County* (2), where they held that it is a condition precedent to the jurisdiction of Justices to make an order under sect. 162 of the Grand Jury (Ireland) Act, 1836, that the lands are not an orchard; and their decision that it is not an orchard may be challenged on certiorari, not merely on the ground that there was no evidence to support it, but also with reference to the weight of evidence, for there is no jurisdiction to make an order under the section where the lands are in fact an orchard. The true legal position as to the magistrates' rights and duty is concisely and, in my opinion, correctly stated by Lord O'Brien C.J., at p. 300, where he says: "If in the investigation of the case the existence of an orchard or any of the other excepted places is established, all jurisdiction to make the order is ousted."

This decision entirely accords with my own construction of sect. 162. So far as is material for our present purposes, the section empowers a county surveyor or contractor to make drains in order to carry off water which might injure any road in or through any lands not being an orchard. For the sake of brevity, I do not refer to any of the other specified exceptions. At the end of the section, however, there follows the proviso that it shall not be lawful for any such contractor or surveyor to enter any land for any such purpose against the will of the occupiers thereof without the previous order of a Justice of the Peace, which order he is authorised and required to grant on its being proved to his satisfaction that such drain cannot be otherwise sufficiently made or cleansed.

(1) [1908] 1 K.B. 365, at p. 371. (2) [1908] 2 I.R. 285.

It seems clear to me that the subject-matter of the section is land which is not an orchard. The magistrates' jurisdiction to make an order depends upon the existence in fact of such subject-matter. As a preliminary to the exercise of their jurisdiction and to their adjudication on the matter, which under the proviso to the section it is their duty to determine, namely, whether such drain could be otherwise sufficiently made or cleansed, it is their duty to inquire into and be satisfied upon the fact, wholly collateral to the merits, that the land is not an orchard. It is only when they have determined this affirmatively that their jurisdiction to make an order under the section arises. But being a collateral fact going to jurisdiction, as distinguished from the issue which under the section they are empowered and directed to determine, the superior Court will review their decision, and will quash their order if satisfied on the evidence that their decision on the point was wrong, and that by such erroneous determination they were usurping a jurisdiction not warranted by the section.

The only doubt which has existed in my mind upon the point was created by the decision of the Court of Appeal in Ireland in the case of *Rex* (*Darcy*) v. *The Justices of County Carlow* (1), where the Court held, in circumstances somewhat similar to the present, that certiorari should be refused on the ground that the magistrate having heard the evidence and determined the question of fact, that the field in that case was not an orchard, there was no jurisdiction to review his determination. I do not hesitate to express my opinion that that decision is unsatisfactory. It is based entirely on *Reg.* v. *Dayman* (2), where the application, which was for mandamus—not, as here, for certiorari—was refused on the obvious ground that the magistrate had already heard and adjudicated; and it further appears by the report (p. 673) in *Dayman's Case* (2) that it was not disputed that there was evidence to justify the magistrate's finding of fact that the place in question was not a new street. There also the form of the statute was such that the question of "new street" or "old highway" might possibly be said not to be a preliminary collateral fact, but part of the real issue which the magistrate had to determine. Finally, the *Carlow Case* (1) is unsatisfactory, in that no attempt is made to deal with the *de Vesci* (3) and *Bradford Cases* (4), which appear to me to be sound law, and which I accordingly prefer to follow.

For the reasons stated by Moore L.J., I do not feel bound to follow the decisions of the late Court of Appeal in the *Carlow Case* (1) as against the consistent line of authority in both England and Ireland to which I have referred, and as against my own clear opinion on the matter.

Feeling at liberty, therefore, to review the finding of the magistrates on the question, I have no hesitation in holding on

(1) [1916] 2 I. R. 313.
(2) 7 E. & B. 672.
(3) [1908] 2 I. R. 285.
(4) [1908] 1 K. B. 365.

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the evidence that the lands were an orchard within the general accepted meaning of that term, to be found in the standard dictionaries, several of which I have consulted. The evidence given by the county surveyor before the magistrates, that there was no orchard on the west side of the drain, carries no weight with me in face of the admitted facts as to the existence of fruit trees on both sides of the drain, which in character, number, and position necessarily constitute in my opinion a single orchard.

This is sufficient to determine the case; but, in deference to the arguments of counsel, who have given us all possible assistance on the point, I feel that I should express my opinion on the further question as to whether it is necessary for the validity of an order made under sect. 162 of the Grand Jury Act, 1836, that the right of entry should be limited to a definite time. The order of the magistrates of 7th May, 1923, admittedly contains no such limitation. Mr. Babington, for the prosecutor, relied upon a long chain of authority, which he contended clearly establishes the necessity for a time limit. Mr. Murphy, for the county surveyor, made a twofold answer. In the first place, he submitted that the cases referred to are not sound law, and that they are not binding on this Court. In the second place, he contended that, even if sound, these cases were all decided on the portion of sect. 162 which empowers a county surveyor or contractor to enter on lands for the purpose of digging and carrying away gravel, stones, sand, or other materials, and that from the nature of the case different considerations apply to the portion of the section which empowers a surveyor or contractor to make drains. I cannot agree with this second contention, and it therefore becomes necessary to consider whether the authorities referred to were rightly decided.

The first Irish case in which the point was determined is *Reg.* (*Bentham*) v. *Justices of County Dublin* (1); but as the decision in that case appears to have turned on *Earl Manvers* v. *Bartholomew* (2), decided on the corresponding English Act of 5 & 6 Wm. 4, c. 50, s. 53, it is necessary first to consider that case. The question there arose, not on a certiorari or other proceeding directly challenging the validity of the magistrates' order ab initio, but in an action for a trespass which the defendant, the county surveyor, sought to justify by an order of the magistrates made eleven years before, granting one of his predecessors licence to dig and carry away materials for road repair. Cockburn C.J., in giving judgment, pointed out that the section of the English Act which authorises the Justices to grant their licence expressly says that they may give a licence to dig, take and carry away such materials "at such times or time as to such Justices shall seem proper." He considered that these words, which, I may say, do not appear in the Irish section, showed that the licence was not intended to be for all future

(1) 14 L. R. I. 443. (2) 4 Q. B. D. 5.

time, but for a certain definite occasion; and the true view, in his opinion, was that the authority which the Justices might give to the surveyor was co-extensive with the existing necessity for materials with reference to which the application for the licence is made. The case, however, only decided that as no necessity existed for the materials which the surveyor wished to obtain at the time that the magistrates' order was made, such order constituted no defence to the action for trespass. It did not, in my opinion, decide that such an order must specify the period for which the licence is granted. This is quite clear from the judgment of Mellor J., who says, at p. 8: "I do not say that the licence must necessarily be given year by year or for any particular time, but I think that it cannot be looked on as absolutely indefinite. It must have some reasonable limits with reference to the particular circumstances of the existing necessity to provide for which it was given." In this view of the case I am confirmed by the judgment of the English King's Bench Division in the recent case of *Rex* v. *Adams* (1).

In *Reg.* (*Bentham*) v. *Justices of County Dublin* (2) the only authority cited was *Earl Manvers* v. *Bartholomew* (3), to which I have referred. The report contains no judgments of the Court, if any such were delivered, and merely states that a certiorari was granted on the ground that it was not contemplated by the Act of Parliament that the order should be given indefinitely, but that some time limit should be mentioned in it. If the Court intended to base their judgment on *Earl Manvers* v. *Bartholomew* (3), I can only say that such judgment goes much further than the Court went in that case. *Earl Manvers* v. *Bartholomew* (3) may have rightly decided that the magistrates' order could not be relied upon to justify an entry after the existing necessity for materials with reference to which the application for the licence was made had disappeared, but it never decided that the order was bad, and would not justify an entry whilst such existing necessity continued, merely because it did not specify any time limit within which it should remain operative.

Bentham's Case (2) was followed by the King's Bench Division in *Reg.* (*Fitzgerald*) v. *Justices of Limerick* (4); but it is quite clear that this was, as the report says, because, in the absence of any decision on the point by the Court of Appeal, the King's Bench regarded *Bentham's Case* (2) as a conclusive authority. Next followed *Reg.* (*Murphy*) v. *Justices of County Wexford* (5), where three of the Judges who decided *Fitzgerald's Case* (4) distinguished *Bentham's Case* (2); but in referring to it Sir P. O'Brien C.J. makes the significant observation that when *Bentham's Case* (2) was cited to him it took him by surprise, and he hoped that there might have been an appeal. Finally, we have the case of *Reg.* (*Guinness*) v. *Justices of Louth* (6), in which

(1) [1923] 1 K. B. 415.
(2) 14 L. R. I. 443.
(3) 4 Q. B. D. 5.
(4) 27 I. L. T. R. 35.
(5) [1894] 2 I. R. 81.
(6) [1898] 2 I. R. 248.

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the majority of the Court (Johnson and Gibson JJ., Murphy J. dissenting) followed *Bentham's Case* (1). Gibson J., however, practically invited an appeal to the Court of Appeal, where *Bentham's Case* (1) might be reconsidered; and Murphy J., in his dissenting judgment, points out, in my opinion most conclusively, the danger of *Bentham's Case* (1). Referring to the fact that the section does not say anything as to fixing the length of time in the order, he says, in language which I would wish to adopt as my own, that this Court can only tend to cause great mischief if it seeks to introduce a particularity into magistrates' orders which the statutes do not require.

For these reasons I am of opinion that we would be wrong were we to interfere with the magistrates' order because of the absence from it of a time limit.

I refrain from expressing any opinion on the point upon which we are told that the case was decided in the King's Bench Division, namely, that the proposed work was not contemplated by the statute, as the drain would draw off the water from Derryadd Lake rather than from the flooded road, which would receive only an indirect benefit. It is unnecessary for us to determine this issue, having regard to our finding that the lands are an orchard; and our decision upon it would necessarily turn upon special facts, and would accordingly be of no real guidance or assistance in future cases.

Solicitor for Armagh County Council: *George Crozier.*
Solicitor for the prosecutor: *Valentine Wilson.*

T. M'C.

(1) 14 L. R. I. 443.

THE KING (EUSTACE) *v.* DISTRICT JUSTICE OF COUNTY TIPPERARY (1).

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Jan. 28. Feb. 4.

Certiorari—District Justice—Excess of jurisdiction—Irregularity of record — Evidence — Improper admission — Essentials of justice — District Justices (Temporary Powers) Act, 1923 (*I.F.S., No.* 6 *of* 1923)—*Public Safety (Emergency Powers) Act,* 1923 (*I.F.S., No.* 28 *of* 1923)—*Public Safety (Emergency Powers) (No.* 2) *Act,* 1923 (*I.F.S., No.* 29 *of* 1923)—*Adaptation of Enactments Act,* 1922 (*I.F.S., No.* 2 *of* 1922)—*Larceny Act,* 1916 (6 & 7 *Geo.* 5, *c.* 50)—*Misleading variance between charge and conviction—Amendment not allowed*—40 & 41 *Vict. c.* 56, *s.* 76.

Two persons (E. and C.) were charged on a joint charge before a District Justice with an offence under the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50). The Justice refused the application of one of the prisoners (E.) to have the case sent for trial by a jury and depositions taken; permitted one of the prisoners (C.) to give evidence on the joint charge before discharge; and without any alteration of the charge as laid, convicted the other prisoner (E.) of an offence only triable on indictment.

Held, that the District Justice, in convicting the prisoner (E.) of an offence which could only be tried on indictment, acted without and in excess of jurisdiction; that the proceedings were irregular, as one of the prisoners was permitted to give evidence on the joint charge before discharge; and that the District Justice misdirected himself in law in refusing to send the case for trial by a jury and to have depositions taken, and in stating that the prosecutor had the option to have the case tried summarily. The order being bad on its face, it was ordered that the writ of certiorari should issue and the conviction be quashed.

Held, per Samuels J., that, even if the Court upon application for certiorari had power to amend a variance between a charge and the conviction thereon, that amendment should not be made, inasmuch as the defendant might have been misled or prejudiced.

Powers and duties of District Justices considered.

CERTIORARI.

Captain Francis R. Eustace, the prosecutor herein, applied to the King's Bench Division for a writ of certiorari directed to the District Justice of County Tipperary, to remove into the King's Bench for the purpose of being quashed the records of his conviction at Nenagh District Court on 18th December, 1923.

The following statement of facts is taken from the judgment of Molony C.J.:—

At a District Court held at Nenagh on Tuesday, the 18th of December, 1923, Captain Francis R. Eustace and Phyllis Cecil Coldwell were brought before the Court by Chief Superintendent Clinton, of the Civic Guard, on a charge which was entered in the order book as follows: "You, the defendants, on the 16th December, 1923, at Puckane, Co. Tipperary, had unlawfully in your possession, well knowing the same to have been stolen, the following property:—240 lbs. of bacon, 5 boxes of biscuits, 3 packages of candles, 2 boxes of soap, one box of Rinso, one box of Lux. 6 pots of jam, and a quantity of currants and raisins." After the hearing the Justice made an order which was entered in the order book, column 7: "On the evidence given, and the

(1) Before MOLONY C.J., and DODD and SAMUELS JJ.

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defendant, Francis R. Eustace, not having given an account to the satisfaction of the District Justice of the manner in which he came by the property found in his possession, is convicted and ordered to be imprisoned in Limerick Jail for twelve months, without hard labour. Defendant Phyllis C. Coldwell is discharged from custody, as the case against her is dismissed without prejudice." And it is stated in column 8 of the order book that the order was made under the Public Safety (Emergency Powers) Act, 1923, sect. 9, and the District Justices (Temporary Powers) Act, 1923.

On the 24th December, 1923, a conditional order for certiorari was made by the Court, on the grounds: 1, that the order was made without and in excess of jurisdiction; 2, that the proceedings were irregular, as no charge was read to the prisoners, nor were they asked to plead; 3, that the District Justice refused the application on behalf of the prisoners to have the accused sent for trial by a jury and depositions taken, and misdirected himself in law in respect thereof by stating that the prosecutor had the option to have it tried summarily; 4, that the District Justice illegally permitted one of the prisoners on the joint charge to give evidence before discharge; 5, that the essentials of justice were disregarded, inasmuch as the said District Justice refused to allow an adjournment of the case for the purpose of enabling the defendant to obtain the assistance of counsel.

The conditional order was obtained on the affidavit of Mr. M'Grath, the solicitor who appeared for Captain Eustace at the hearing, and subsequently affidavits were filed by Captain Eustace, who was then and up to the time of the application remained imprisoned in Limerick Jail.

Mr. Flood, District Justice, filed an affidavit by way of cause, and the case then came before the King's Bench on the application of Captain Eustace to make absolute the conditional order notwithstanding the cause shown.

Serjeant Hanna K.C. (with him *Conner K.C.* and *Dockrell*), for the prosecutor:—

The order was made without and in excess of jurisdiction, because the offence on which the prisoner was arrested is one on which he can only be tried under the Larceny Act, 1916, on indictment. The conviction is bad if he was convicted under sect. 9 of the Public Safety (Emergency Powers) Act, 1923 (I.F.S.), because that section is itself ultra vires Article 72 of the Constitution; and even if that section be intra vires, the conviction is not for the charge as laid. The proceedings were irregular, as no charge was read to the prisoners, nor were they asked to plead, and one of the prisoners on the joint charge was permitted to give evidence before discharge: *R.* v. *Payne* (1). The District Justice misdirected himself in law in stating that

(1) L. R. 1 C. C. R. 349.

the prosecutor had the option to have the charge tried summarily, and in refusing the application to have the case sent for trial by a jury and depositions taken. In refusing to allow an adjournment to enable counsel to be consulted the essentials of justice were disregarded. The conviction should be quashed. [He cited *R.* v. *Langmead* (1); *Looker* v. *Halcomb* (2); *Fletcher* v. *Calthrop* (3); *R.* v. *Sullivan* (4); *R.* v. *Cockshott* (5).]

Timothy Sullivan K.C. (with him the *Attorney-General* and *O'Byrne*):—

The District Justice on affidavit denies the statement that the charge against the prisoners was not read to them in open Court, and also denies that there was any application for an adjournment. The prisoner (C.), who gave evidence before discharge, did so on the application of the other prisoner (E.), and therefore the latter cannot now take advantage of the fact that it was so given, to have the conviction quashed. As to the charge being bad on its face, the prisoner was convicted under sect. 9 of the Public Safety (Emergency Powers) Act, 1923 (I.F.S.), and the offence with which he was charged was described in language broad enough to cover an offence under that section. [He cited *Finlay* v. *Attorney-General* (6); *Forbes* v. *Lloyd* (7).]

DODD J.: I have yet to learn that a man can be arrested on suspicion for a misdemeanour, but a man can be arrested on suspicion for a felony. Everything is right as soon as it is a felony, but everything is wrong as long as it is a misdemeanour triable at Petty Sessions.

O'Byrne: Under sect. 9 of the Public Safety (Emergency Powers) Act, 1923 (I.F.S.), the District Justice was given jurisdiction to try the prisoners for this offence, which thereunder was not triable by jury. It is a minor offence within Article 72 of the Constitution, and sect. 9 of the Public Safety Act was therefore intra vires.

Conner K.C., in reply:—

The charge is one of felony, and it is not a minor offence. Sect. 9 of the Public Safety Act therefore, in so far as it enacts that such a serious charge be tried summarily, is ultra vires. Further, there is no power given to arrest under sect. 9, although there is such power given for arrest for the twelve offences in the schedule to that Act.

MOLONY C.J., having stated the facts, continued:—

Before proceeding to consider the grounds mentioned in the conditional order, it is necessary to have a clear view of the duties and powers of District Justices.

(1) 9 Cox, 464.
(2) 4 Bing. 184.
(3) 6 Q.B. 882.
(4) I R. 8 C.L. 404.
(5) [1898] 1 Q. B. 582.
(6) [1898] 5 W. L. R. 54.
(7) I.R. 10 C.L. 552.

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District Justices were appointed under the provisions of the District Justices (Temporary Powers) Act, 1923 (I.F.S., No. 6 of 1923), sect. 2 of which is as follows:—

2. (1) It shall be the duty of each District Justice appointed under this Act to hold district Courts at such places within the district allotted to him at such times as shall be prescribed by the Minister.

(2) A District Justice sitting in and holding a district Court pursuant to this Act shall have all the powers, jurisdiction, and authority which were, immediately before the 6th December, 1922, vested by statute or otherwise in a Justice of the Peace sitting at Petty Sessions.

(3) Every order, decree, or judgment made or pronounced by a District Justice sitting in and holding a district Court pursuant to this Act shall be subject to the same appeal (if any) as a similar order, decree, or judgment made or pronounced by a Justice of the Peace sitting in Petty Sessions would have been subject to previous to the 6th December, 1922.

The section contains two other sub-sections, which are not material to the present application.

Sect. 11 provides (inter alia) that the expression "Justice of the Peace" means and includes one Justice of the Peace sitting or acting alone, or two or more Justices of the Peace sitting or acting together.

The effect of these sections is to give a District Justice sitting in a District Court all the power, jurisdiction, and authority formerly exercised by a Justice of the Peace sitting alone in Petty Sessions, or of two or more Justices sitting together.

Article 73 of the Constitution of the Irish Free State provides that, subject to the Constitution, and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstat Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas. The Constitution came into force on the 6th December, 1922, and consequently the law to be administered by this Court is the law in force as of that date, subject to any changes which have since been effected by the Oireachtas.

The Oireachtas, on the 20th December, 1922, passed the Adaptation of Enactments Act (No. 2 of 1922), which provides for certain interpretations and adaptations of the Acts passed by the British Parliament which were in force on the 6th December, 1922, and every British Act of Parliament, including the Larceny Act of 1916 (6 & 7 Geo. 5, c. 50), to which I shall have to refer, must now be read subject to the provisions of this Act.

It subsequently became necessary to make temporary provision for the preservation of public safety, and on the 3rd of August, 1923, the Public Safety (Emergency Powers) (No. 2) Act, 1923 (I.F.S., No. 29 of 1923), came into force, and was to continue in force for six months after that date. Sect. 9 of this Act is as follows:—

Every person who shall be charged before a District Justice with having in his possession or on his premises with his knowledge, or conveying in any

manner anything which may reasonably be suspected of being stolen or unlawfully obtained, and shall not give an account to the satisfaction of such District Justice of the manner in which he came by the same, shall be guilty of an offence under this Act, and shall be liable to a punishment not exceeding twelve months' imprisonment, with or without hard labour.

It will be noted that under this section it is not necessary to prove that the goods were actually stolen or unlawfully obtained, but it is sufficient if the accused has in his possession anything which may reasonably be suspected of having been stolen or unlawfully obtained, and does not give an account to the satisfaction of the District Justice of the manner in which he came by the same. The section is practically the same, except as regards the punishment, and was obviously copied from sect. 5 of the Dublin Police Act of 1842 (5 & 6 Vict. c. 24), which is to the following effect:—

Every person who shall be brought before any of the Divisional Justices charged with having in his possession or on his premises with his knowledge, or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such Justice how he came by the same, shall be deemed guilty of a misdemeanour, and on conviction thereof before such Justice or Justices shall be liable to a penalty of not more than £5, or, in the discretion of the Justice, may be imprisoned in any jail or house of correction within the police district, with or without hard labour, for any term not exceeding two calendar months.

This Act applies only to the Dublin Metropolitan Police district. Apart from the special provisions of the Public Safety (Emergency Powers) Act, 1923, District Justices can only convict of larceny where the value of the property does not exceed 5s., and the accused consents to have the charge summarily tried and determined, or unless the accused pleads guilty where the value of the property is over 5s.: Criminal Justice Act, 1885 (18 & 19 Vict. c. 126), sects. 1, 2, and 3.

In a few instances, having no relation to the present case, a person may be convicted before a District Justice under the Larceny Act, 1861, of stealing certain specific things, and sect. 97 of the Act provides that in these cases any person who shall receive the property knowing it to have been stolen shall be liable to the same penalty as the thief.

Where, however, a person is not charged before a District Justice for receiving under the Larceny Act, 1861, or for an offence under sect. 9 of the Public Safety (Emergency Powers) Act, 1923 (I.F.S.), the case must be dealt with under sect. 33 of the Larceny Act of 1916, which is as follows:—

Every person who receives any property knowing the same to have been stolen or obtained in any manner whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence of the like degree (whether felony or misdemeanour), and on conviction thereof is liable: (*a*) In the case of felony, to penal servitude for any term not exceeding fourteen years; (*b*) In the case of misdemeanour, to penal servitude for any term not exceeding seven years; (*c*) In either case, if a male under the age of sixteen years, to be once privately whipped in addition to any punishment to which he may by law be liable.

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I now proceed to consider the grounds upon which it is sought to quash the order of the District Justice in the present case, and I shall deal with them as mentioned in the conditional order:—

1. That the order was made without and in excess of jurisdiction. As regards jurisdiction, it is necessary to note, as was well said by Lord Denman in *The Queen* v. *Bolton* (1): "The question of jurisdiction does not depend upon the truth or falsehood of the charge, but upon its nature. It is determinable at the commencement and not at the conclusion of the inquiry; and affidavits to be receivable must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry." This passage was quoted with approval by Lord O'Brien in *The King* (*Martin*) v. *Mahony* (2), and more recently by Lord Sumner in *Rex* v. *Nat Bell Liquors, Ltd.* (3), where he stated that the law laid down in *The Queen* v. *Bolton* (1) has never seriously been disputed in England; and we know it was expressly affirmed in Ireland in *The King* (*Martin*) v. *Mahony* (2). When we speak of excess or want of jurisdiction it is well to remember the definition, or rather the description, of these words given by Cave J. in *R.* v. *Bradley* (4): "Excess of jurisdiction may either exist at the time when the summons comes on to be heard—and in that case there is no jurisdiction to hear the case at all—or it may in some cases crop up in the course of the hearing, as, for example, where the question of title to land comes into question, and in such a case the jurisdiction of the magistrate is ousted. Whenever either of these two things happens, if the magistrates proceed to hear and determine the case, their decision must be brought up by certiorari for the purpose of being quashed, as being in excess of jurisdiction . . . If the magistrates have no jurisdiction, they cannot proceed with the case either to convict or to acquit; they have no jurisdiction to do either; they must stop short. That is the meaning of the expression 'want of jurisdiction,' and that is what is meant by saying that the magistrates have exceeded their jurisdiction."

In the present case the Superintendent of the Civic Guard charged the accused with having unlawfully certain goods in their possession, well knowing the same to have been stolen. I have no doubt that the Superintendent, who used apt words for the purpose, intended to charge the accused with an indictable offence under the Larceny Act, and not with the new offence which was created by sect. 9 of the Public Safety (Emergency Powers) Act, 1923; it was a charge of an indictable offence in respect of which the only duty of the District Justice was to take depositions and return the case for trial. The Justice, however, at the instance of the State solicitor, and without any alteration of the charge as laid, proceeded to hear the case, and convicted the

(1) 1 Q. B. 66.
(2) [1910] 2 I. R. 695-706.
(3) [1922] 2 A. C. 128-154.
(4) 70 L. T. (N. S.), 379.

accused of having the goods in his possession well knowing the same to have been stolen, although this was not a charge upon which he could have convicted under the provisions of the later statute. It was contended for the District Justice that the charge as laid was practically the same as mentioned in sect. 9 of the Public Safety Act; but it is rather futile to suggest that it is the same thing to charge a man with being in possession of goods which somebody else may reasonably suspect of having been stolen and to charge him with being in possession of goods which he himself well knew to have been stolen, more especially where the law itself draws a clear distinction between the two offences, and makes one offence punishable on summary conviction and the other only on indictment. It was further contended that even though the conviction is clearly bad in form, the defect is cured by sect. 76 of 41 & 42 Vict. c. 56, which enacts that :—

> No conviction or order made by any Justice or Justices shall be held void or quashed by reason of any defect, omission, or variance in the summons, charge, or information upon which the order shall purport to be made, provided such defect, omission, or variance shall not have misled or prejudiced the defendant, or have affected the merits of the case.

In *The King* (*U.D.C., Athy*) v. *The Justices of Kildare* (1) this section was applied to a case under the Public Health (Ireland) Act, 1878, where it was alleged that the order was bad on its face, because it did not state that the complainant was the owner of a dwelling-house and used the word "house," but where it appeared that the house was in fact a dwelling-house, and that this was not disputed at the hearing before the Justices: see also *The King* (*Sheehan*) v. *Justices of the County of Waterford* (2). However wide a meaning may be given to this section, it cannot be so far extended as to apply to a case where the words of the charge aptly described an offence which can only be tried on indictment, and where the conviction purports to sentence the accused to imprisonment for an offence over which the Justice had no jurisdiction.

Serjeant Hanna, on behalf of Captain Eustace, contended with great persistence and force that sect. 9 of the Public Safety Act, 1923 (I.F.S.), was a violation of Article 72 of the Constitution, which provides in express terms that no person shall be tried on any criminal charge without a jury, save in the case of charges in respect of minor offences triable by law before a Court of summary jurisdiction. I do not think it necessary to discuss the question in detail, more especially as the Act has now expired; but I have no doubt that a charge properly laid under sect. 9 of the Public Safety Act ought to be regarded as for a minor offence, and indeed offences under sect. 5 of the Dublin Police Act of 1842 have been so dealt with in the Dublin Metropolitan Police district since the passing of that Act, over

(1) [1912] 2 I. R. 64. (2) [1914] 2 I. R. 178.

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eighty years ago. The mere fact of the penalty having been increased does not alter the character of the offence.

2. That the proceedings were irregular, as no charge was read to the prisoners, nor were they asked to plead.

Upon this point I am satisfied with the affidavit of the District Justice, that the charge was read, and that the defendants did not admit their guilt, and that consequently, if this was a case which could be determined on summary jurisdiction, the formalities required by sect. 19 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), were complied with.

3. That the District Justice refused the application on behalf of the prisoners to have the case sent for trial by a jury and depositions taken, and misdirected himself in law in respect thereof by stating that the prosecutor had the option to have it tried summarily.

In any matter in which there is a controversy between Mr. M'Grath, the solicitor for the prosecutor, and the District Justice, I will assume for the purpose of my judgment that the account given by the District Justice is correct. The District Justice deals with this matter in the sixth paragraph of his affidavit, in which he says: "At the commencement of the case Mr. M'Grath stated he did not expect that the case would be dealt with by the District Court, and had assumed that depositions would be taken and the case returned for trial. He pointed out that the case was a serious one, and that if the case were treated as an indictable one he would be able to have the assistance of counsel at the trial." I think that Mr. M'Grath was quite justified in assuming that depositions would be taken and the case returned for trial, when in fact what was charged against the accused was an indictable offence; and I have no doubt that this course would have been followed by the District Justice were it not for the intervention of the State solicitor. The affidavit then proceeds: "Mr. O'Brien, the State solicitor, stated that the case came within the summary provision of sect. 9 of the Public Safety Act, and that it was the class of case which the said Act was peculiarly intended to meet, and he asked me to deal with the case under that section. I then said that I would proceed under the said section, and Mr. M'Grath thereupon stated in open Court that in that event he would not object to my jurisdiction." If, however, the State solicitor wished the case to be tried under sect. 9, he ought to have seen that the charge was altered—and the District Justice ought to have seen that it was so altered—before he proceeded to deal with the case under that section. It is quite true that Mr. M'Grath could not object to the jurisdiction of the Justice to alter the charge so as to make it come within sect. 9; but it is clear that he never consented to having such a charge dealt with without amendment, and subsequently during the hearing of the case the District Justice says that Mr. M'Grath stated that he did not know the exact nature of the charge against his clients, which I quite believe, and that

then he, the District Justice, read out from the order book, word for word, the charge as it appeared therein, and upon which apparently the State solicitor had elected to proceed without amendment or alteration.

4. That the said District Justice illegally permitted one of the prisoners on the joint charge to give evidence before discharge.

We are, of course, bound by the decision of this Court in *R.* (*Martin*) v. *Mahony* (1), and cannot look at the evidence which was given in the case, being confined to the record. But it appears from the order book, which is the record, that P. C. Coldwell was examined as a witness at the hearing, and if there was any doubt as to her identity with P. C. Coldwell, one of the accused, evidence could be given aliunde, and is in fact given in the affidavit of the District Justice. It is, no doubt, to be regretted that the law which prevents an accused person from giving evidence has not been altered in the Free State as it was altered in England in 1898, and in Northern Ireland last year; but it is the duty of the District Justice, no less than ours, to administer the law as he finds it; and it was held by no less than sixteen Judges in the case of *R.* v. *Payne* (2) that where two persons are indicted and tried together one is not a competent witness for the other. In the present case the two accused were charged and tried together; it is admitted that at the time P. C. Coldwell gave evidence she had not been discharged, and consequently the reception of this evidence was illegal. I would, however, hesitate to grant a writ upon this ground alone, as I think it might be argued with considerable force that the accused (Eustace) had by his conduct precluded himself from taking such an objection. It is quite clear that P. C. Coldwell would not have been examined except at the instance and request of Captain Eustace, and there are a number of cases which lay down that on an application for certiorari the Court will take into consideration the conduct of the party applying: *South Holland Drainage Committee-men* (3); *The King* (*Taverner*) v. *Justices of Co. Tyrone* (4); *The King* v. *East Riding of Yorkshire Justices* (5); *The King* v. *Leicester Justices and Compton* (6).

On the other hand, there is authority for saying that these cases do not apply where the liberty of the subject is involved: see *The King* (*M'Swiggan*) v. *Justices of Londonderry* (7); and that in such cases the clear, imperative duty of the Justice is to see that the formalities of the law are observed: *R.* v. *Mary M'Mahon* (8); *Reg.* v. *Gibson* (9); and if he fails in that duty the conviction is bad, although he may have been misled by the action of the defendant or his advisers: *Reg.* v. *Cockshott* (10).

(1) [1910] 2 I. R. 695.
(2) L. R. 1 C. C. R. 349
(3) 8 Ad. & E. 429.
(4) [1909] 2 I. R. 763.
(5) 2 Nev. & M., K. B. 93.
(6) 29 L. J. Mag. Cases, 2-3.
(7) [1905] 2 I. R. 318, per Fitzgibbon L.J. 320.
(8) I. R. 9 C. L. 309.
(9) 18 Q. B. D. 537.
(10) [1898] 1 Q. B. 582.

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In all the circumstances of the case, I do not make the admission of this evidence one of the grounds upon which I grant the writ, as the authorities were not fully opened to us, and the question appears to be one of some difficulty, about which I have not formed a final opinion; but my impression is that the order is bad also on this ground.

5. That the essentials of justice were disregarded, inasmuch as the said District Justice refused to allow an adjournment of the case for the purpose of enabling the defendant to obtain the assistance of counsel.

In reference to this ground, the District Justice has simply sworn that Mr. M'Grath did not at any time apply for an adjournment; and I accept this statement.

In the result I am clearly of opinion that the order as made is bad on its face on the grounds stated, and was made without and in excess of jurisdiction, and that consequently the writ of certiorari should go and the conviction be quashed.

To prevent any misapprehension, it may be well to state that our order quashing the conviction does not amount to an acquittal. We have no materials before us to determine guilt or innocence, and we have no jurisdiction to do so: *Conlin* v. *Patterson* (1); and if any subsequent proceedings are taken, the accused cannot avail himself of the plea of autrefois acquit: see *Conlin* v. *Patterson* (1).

We do not give costs against the District Justice, as we recognise that, while he made a mistake, he was honestly endeavouring to do his duty in circumstances somewhat unusual and certainly difficult.

DODD J.:—

The case comes to be determined upon a narrow issue. It is one of some importance, and raises questions of constitutional interest.

First, is the section under which the proceedings have been brought against the accused intra vires the Constitution? It is said to be at variance with clause 72 of the Treaty. If that be so, the whole of the Public Safety (Emergency Powers) Act, 1923 (I.F.S.), is also ultra vires. I decline to occupy time dealing with that. The contention is based upon the words, "minor offences," in the section referred to. It has been treated as if it were to be decided as a special demurrer. The Act contemplates three classes of offences—one triable by the military, one triable on indictment, and one triable by magistrates. The offence created by the Act is a new one, and included in the category of minor offences, to be tried by the Justice. The section that enacts the offence confers the jurisdiction. It is not an indictable offence. The accused could not be returned for trial upon it; and the claim of the culprits here to be tried by a jury has no foundation.

(1) [1915] 2 I. R. 169, per Palles C. B. 175. per Dodd J. 178.

It is put differently, however. It is suggested—that is too strong a word—whispered that the Justice had facts before him which would warrant him in sending the accused for trial on what would be an indictable offence under the Larceny Acts, and acted as he did at the hearing maliciously, with intent to deprive the accused of trial by jury. That might be a possible claim, if brought against the Justice for misconduct. I say possible, for it would be difficult to sustain such a claim on facts such as those before us; and on the law, as I understand it, I think a Justice is not bound to adopt the most severe course against an accused person, nor is a prosecutor. The least charge, and the least punishment on the individual consistent with the duty of making the law a terror to evildoers and a praise to them that do well, may, I suggest, be adopted without it being counted as unrighteousness in either Judge or prosecutor. I sincerely hope so.

A lady was arrested at a Land League meeting and brought to the police barracks, and then to the Petty Sessions Court. On the facts a Crown prosecutor could have framed one of several indictments. The Justice holding that there were good grounds for suspecting that she had entered on and was entering upon a course likely to lead to crime, bound her over to give security for good behaviour—apparently the Justices were content with her own recognizance—and in default six months' imprisonment. She declined to be bound or give bail; she was sent to prison. Application for a certiorari was made. The Court refused to quash the order: *M'Cormick's Case* (1).

It is well established that a summons is not necessary to give the Justice jurisdiction. It is so laid down by the Chief Baron and Mr. Justice Gibson, Mr. Justice Boyd concurring, in the *Kilkenny case* (2): "To support a conviction there must be a valid charge, and whether such charge is contained in a summons or information or is made ore tenus the record, the order book must show an offence. The Justices are given wide powers of amendment under the Petty Sessions Act before adjudication, and sect. 76 of the Act of 1877 purports to extend those powers after adjudication or order. The order book is a compendious form of record, but it must disclose due exercise of jurisdiction—a valid complaint, with an appropriate conviction." In another case he puts it, "the conviction must be conformable with the charge."

All the other questions being out of the way, the sole question for adjudication now is: Is the conviction conformable to the charge? I think it is clear that the Superintendent of the Civic Guard did present the charge as one in which the Justice was asked to return the case for trial on indictment, and on the record the conviction does not follow this charge. As affidavits on both sides have been filed, I am at liberty to deal with what occurred at the trial. The Justice says in his affidavit: "At the com-

(1) 16 I. L. T. 91.

(2) [1912] 2 I. R. 1.

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mencement of the case Mr. M'Grath stated he did not expect that the case would be dealt with by the District Justice, and had assumed that depositions would be taken and the case returned for trial. He pointed out that the case was a serious one, and that if the case were treated as an indictable one he would be able to have the assistance of counsel at the trial. Mr. O'Brien, the State solicitor, stated that the case came within the summary provision of sect. 9 of the Public Safety Act (I.F.S.), and that it was the class of case which the said Act was peculiarly intended to meet; and he asked me to deal with the case under the section. I then said that I would proceed under the said section; and Mr. M'Grath thereupon stated in open Court that in that event he would not object to my jurisdiction." I accept this as accurate. If the case had been sent forward for trial, Mr. M'Grath's client was liable to a lengthened term of penal servitude. He accepted the milder proceeding.

It lay upon the solicitor for the prosecutor then to amend the charges. He did not do so. What would an experienced—perhaps I should say a very experienced—Judge then have done? He would say, Wait until the charge is framed so as to bring it within the Act. He would have directed the clerk to make necessary amendment. The charge then would have run as follows: "Having in their possession things (setting out the goods under a videlicet, but following the word 'anything' in the Act), which may reasonably be suspected of being stolen." I am in doubt whether the charge should not end there, the remaining words casting the obligation upon the accused "to give an account to the satisfaction of the District Justice" not being part of the charge.

In a summons it would be expedient to add, ex abundanti cautela, "and you are hereby called upon to give an account to the satisfaction of the District Justice of the manner in which you came by the same," i.e. the thing that is suspected of being stolen.

The clerk read out sect. 9 of the Act of 1923, and the Justice appears also to have read it out; and the Act is set out on the record as the one under which the complaint is made. But that does not cure a defect in the complaint. No amendment was in fact made. Though no amendment was made in the charge as presented in the first instance by the Inspector of the Civic Guard, the trial proceeded as if such amendment had been made. The accused both admitted that they had been in possession of things "reasonably suspected of being stolen"—in fact, they knew the goods had been stolen—and they purported to satisfy the Justice as to how they came by the goods. They got them under duress. That was the only issue. It was determined against them. Up to the last minute the Justice, if his attention had been called to it, could have amended the record.

Then comes the question urged upon us: Have we a discretion to refuse to grant certiorari? Ought we, if it is within our

discretion, to refuse? The word "gambled" was used in the course of the argument; I do not much like it, though it has the sanction of Lord Macnaghten. It is too late to call for a new deal at this stage of the game. It is not appropriate here. If there was a game, it was between the legal gentlemen. Do the facts, then, bring the case within the principle of the decision in *R.* (*Taverner*) v. *The Justices of Tyrone* (1)?

There are cases in which the writ is ex debito justitiae: *The King* (*M'Carthy*) v. *The Justices of Cork* (2). All the Judges were of opinion on the facts there that it was as of right, subject to this qualification, that the accused had not by his conduct in the course of the proceedings disentitled himself to apply to this Court for redress. Lord O'Brien thought he was at liberty to refuse the writ because the applicant was a dishonest man outside the proceedings, and he referred to the *Listowel Case* (3). But all the other Judges limited the discretion to refuse to grant founded upon conduct in the course of the proceedings.

There is another matter which, I think also, I might take into consideration, though it would not of itself be a ground to refuse the application. It is not the practice of the Court to grant an order that will bring no relief to the applicant. This Court has decided in *Conlin* v. *Patterson* (4): "Where a conviction by Justices is quashed on certiorari on the ground that it is bad on its face by reason of the sentence pronounced being one which the Justices have no jurisdiction to award, the case is to be treated as if the conviction had never been made. The accused may be put on trial again, and he cannot successfully avail himself of the objection of autrefois convict or autrefois acquit, either of which must have for its basis an adjudication of fact within jurisdiction." It may be that the accused will rely on the assumption alluded to in *Conlin* v. *Patterson* (4), that the Crown would not take a "second hop" at a man. Unless this case can be distinguished from that one, it would seem that the prosecutor will be at liberty to proceed de novo. I said in that case that the strictest advocate for fair play would admit that the authorities were within their rights in putting in force any remedy which the law permits. One might say the same here. In the event of the decision being adhered to, it would only be a roundabout method of amendment. The form of an order is given in *Sheehan* v. *The Justices of Waterford* (5), following *The King* (*Johnston*) v. *The Justices of Belfast* (6). I was of opinion for some time that we might refuse the writ in this case in our discretion. This would, in my opinion, preserve the integrity of the record and meet the justice—the rational justice—of the case.

This, however, is a matter upon which I could not press my view against the view of my colleagues. The accused may have

(1) 1909] I. R. 763, at p. 768.
(2) [1910] 2 I. R. 421.
(3) 1 I. R. 9 C. L. 46.
(4) [1915] 2 I. R. 169.
(5) [1914] 2 I. R. 178.
(6) [1914] 2 I. R. 181.

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a chance of finding the Justice in a more placable mood as to the length of the sentence. The lady is discharged, and can be examined in any subsequent proceeding. And there are other considerations, upon which I need not dwell. Captain Eustace may appeal, may have the conviction reversed or the sentence diminished, or he may prevail on the authorities to have him sent for trial.

In deference to my colleagues, I read again the cases in which the writ was withheld. In each of them it was the accused himself who caused the error on the record. On fuller reflection, I think the accused should not be deprived of his writ owing to what occurred at a trial which it was not within his power to control, and in the conduct of a procedure of which he was not informed. I therefore concur in the judgment of the Chief Justice.

SAMUELS J.:—

I am of opinion that the conviction is bad upon two grounds: First, the charge is clearly for the indictable offence of receiving goods knowing them to have been stolen. The conviction is for the offence created by sect. 9 of the Public Safety (Emergency Powers) (No. 2) Act, 1923 (I.F.S.), similar to the Dublin Police Act, 1842 (5 & 6 Vict. c. 24), sect. 5, of having in possession things which might be reasonably suspected of being stolen or unlawfully obtained, and not giving an account to the satisfaction of the Justice of the manner in which the accused came by the same. No amendment of the charge was made. The value of the property exceeded five shillings, and the accused did not consent to the charge of receiving being dealt with summarily, nor did he plead guilty to such charge. In these circumstances the Justice had no jurisdiction, without previous amendment of the charge, to convict and to impose the penalty he did. His jurisdiction, unless the charge was amended, was limited to taking depositions and returning the accused for trial. The offence of receiving goods well knowing them to have been stolen is essentially different from the offence of having in possession anything which may reasonably be suspected of being stolen and not giving a satisfactory account of how the same has been come by. The latter offence can be proved without evidence that the things have been stolen. If the Justice comes to the conclusion that they are reasonably suspected of being stolen, he can convict summarily, unless the accused gives a satisfactory account of how he came by them. To sustain a conviction of the indictable offence of receiving, the goods must be proved to have been the subject of a larceny, and guilty knowledge that they were stolen must be found to exist on the part of the accused.

Under sect. 21 of the Petty Sessions Act, 1851 (14 & 15 Vict. c. 93), "the Justices shall make such order as shall be authorised

by the Act under which the complaint is made." "It is the substance of that order which is to be entered in the order book, and it is that order which is to be deemed a conviction; therefore, if the complaint does not state that, by reason of which the statute authorises the Justices to make the order, the entry of it will not answer the description of that which is to be deemed a conviction," per Palles C.B.: *The King* (*Gorey*) v. *Justices of Kilkenny* (1). "The order book is a compendious form of record, but it must disclose due exercise of jurisdiction; a valid complaint, with an appropriate conviction," per Gibson J.: *The King* (*Gorey*) v. *Justices of Kilkenny* (1).

It was contended that the defect could be cured after conviction under the power of amendment given by sect. 76 of 41 & 42 Vict. c. 56; but I find it impossible to hold that in this case the variance between the charge and the conviction was not such as to have misled or prejudiced the defendant, or to have affected the merits of the case; the time for an appeal from a conviction under sect. 9 of the Public Safety (Emergency Powers) Act (I.F.S.) has long expired; and even had this Court power upon certiorari to amend the charge, which Palles C.B. was of opinion it had not—(see his judgment in *The King* (*Urban District Council, Athy*) v. *Justices of Kildare* (2)—yet I have no hesitation in saying the amendment should not be made. The defendant was charged with an indictable offence, and on that charge he was entitled to a trial by jury; to substitute now for that charge an amended charge which would support a summary conviction and a penalty inflicted summarily of twelve months' imprisonment would be an impossible stretching of any such power of amendment, even were it assumed to exist at all on this application.

The defect is not a mere formal or trivial error on the face of the order; it goes to the very substance of the charge and of the adjudication. It is one which, in my opinion, cannot be now amended, and accordingly the conviction must be quashed.

Secondly, I am further of opinion that the order for certiorari should go, as one of the joint defendants was examined as a witness. This makes the conviction illegal and void. It is a fundamental error appearing on the record. There is no statute as yet existing in the Irish Free State enabling an accused person to be examined on his own behalf, or on behalf of a person jointly accused with him, in a case such as this. It was urged that his co-defendant was called at the instance of Captain Eustace himself, and that therefore he should not be allowed to rely on the illegality of the evidence as a ground for certiorari. I do not agree. The Court should have controlled the proceedings, and not allowed illegal evidence. This is a criminal matter; the liberty of the subject is involved; and the admission of the evidence avoids the conviction. It was suggested that this Court cannot be informed that the P. C. Coldwell appearing on the

(1) [1912] 2 I. R. 1, at p. 17. (2) [1912] 2 I. R. 64.

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record as having been examined as a witness is Phyllis Cecil Coldwell, who was named as co-defendant and discharged without prejudice. I do not agree. This Court can assure itself of the identity of the persons whose names appear on the record, and the affidavits read upon the motion can be looked at for this purpose, and they leave no doubt that the Phyllis Cecil Coldwell who was under arrest as a co-defendant in the case was the same person as the P. C. Coldwell named in the list of witnesses.

Upon the constitutional question that has been raised I am of opinion that the Irish Free State Legislature, the Oireachtas, had full power within the Constitution to enact sect. 9 of the Public Safety (Emergency Powers) (No. 2) Act, 1923.

Solicitors for Captain F. R. Eustace: *Wm. Findlater & Co.*
Solicitor for the State: *The Chief State Solicitor.*

H. H.

MARY LOUISE ELIZABETH KENNEDY AND GEORGE HUBERT B. KENNEDY *v.* THE MERCHANT WAREHOUSING CO., LTD., AND JOSEPH MAGUIRE (1).

Appeal.
(I. F. S.)
1924.
Feb. 7.

(1923. No. 12,367.)

Negligence — Collision — Two joint tort-feasors — Verdict against one defendant — No finding against second defendant — Latter's right to judgment—Exoneration.

Two defendants, A. and B., were sued jointly for damages caused by their negligence. A. was the owner of a motor lorry, and B., a member of the Civic Guard, was the driver of a motor car. A.'s servant, driving the lorry on his proper side of the road, was overtaken and passed by B., whose car struck the lorry, which swerved, collided with, and knocked down the wall of the plaintiffs' cottage. The jury found the defendant B. guilty of negligence, disagreed as to the negligence of A.'s servant, and assessed damages. After the verdict the Judge, at the request of counsel for the plaintiffs, abstained from giving judgment against the defendant B. Subsequently counsel for the defendant A. asked the Judge before whom the action was tried to enter judgment for the plaintiffs against the defendant B., or, in the alternative, to enter judgment for the defendant A. The Judge refused the application.

Held (Molony C.J. dissenting), that the verdict against B. exonerated A., and that judgment should be entered for the defendant A.

MOTION by way of appeal by the defendants, the Merchant Warehousing Co., that judgment be entered for the plaintiffs against the defendant, Joseph Maguire, for the sum of £95, and that judgment be entered for the appellants.

The case was tried before Pim J. and a common jury on December 5th and 6th, 1923. The action was brought by Mary Louise Elizabeth Kennedy and George Hubert Kennedy against the two defendants for negligence—as to the Merchant Warehousing Company in the driving of a motor lorry, with a trailer behind; and as to the defendant John Joseph Maguire, for negligence in the driving of a motor car. The accident took place at Blackrock, Co. Dublin, on April 22nd, 1923.

The motor lorry, with trailer attached, driven by a servant of the Merchant Warehousing Co., was proceeding towards the city, on its own side of the road, at a pace of about six miles an hour. A hackney car, also on its proper side, was coming from the opposite direction. A Crossley car, driven by the defendant Maguire, a member of the Civic Guard, coming behind the lorry, endeavoured to pass it just as the hackney car approached. According to the evidence of the driver of the lorry, the motor car struck the front right wheel of the lorry, making a dint on the hub, with the result that it swerved to the left, collided with the plaintiffs' cottage, and knocked down portion of the wall. The steering arm was broken, and the lorry could not be controlled. The driver swore that he heard no horn sounded by the

(1) Before MOLONY C.J., and RONAN and O'CONNOR L.JJ.

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defendant Maguire. The latter stated in his evidence that he sounded his horn three or four times when the lorry was fifty or sixty yards ahead of him. As he was about to pass it, he sounded his horn again, but the lorry, which was almost in the middle of the road, did not change its position. He did not notice the hackney car coming from the opposite direction until he was about in line with the trailer. He then swerved slightly to the left in front of the lorry. He felt nothing while he was passing the lorry. One of the passengers in the motor car said he noticed a "scrape," as if the mud-guard hit the lorry.

Mr. Battersby, on behalf of the Merchant Warehousing Co., asked for a direction on the ground that there was no evidence of negligence against his clients. Pim J. refused a direction, holding that there was some evidence of negligence on the part of the defendant company to go to the jury.

The jury found that the defendant Maguire was guilty of negligence, and assessed damages at £95, but disagreed as to whether the defendants, the Merchant Warehousing Co., were guilty of negligence. Counsel for the plaintiffs stated that he did not ask for judgment against Maguire; and at his request the learned Judge abstained from giving judgment, reserving to the defendant company the right to move the Court of Appeal for judgment or otherwise, as they might be respectively advised. Some days later counsel for the defendant company asked Pim J. to enter judgment for the plaintiffs as against Maguire, notwithstanding the fact that they had not asked for it; or, in the alternative, to enter judgment for the defendant company. The learned Judge refused the application. He approved of the finding in respect of Guard Maguire.

Battersby K.C. (with him *C. S. Campbell*), for the defendants, the Merchant Warehousing Company:—

The only negligence found by the jury was that of Guard Maguire, and the only negligence alleged against him was that he drove his motor car against the front wheel of the lorry, turning it at right angles into the plaintiffs' wall, and smashing the steering gear. That verdict exonerates the appellants' driver: *Clark* v. *Chambers* (1); and it establishes that the negligence of Guard Maguire was the effective cause of the accident: *M'Dowell* v. *Great Western Railway* (2); *Sullivan* v. *Creed* (3), at p. 350, where all the cases are reviewed. Overtaking vehicles must allow for the vehicle they are about to pass pulling into the middle of the road, unless the person in charge of it is seen by the person in charge of the overtaking vehicle to be aware of the latter's intention: *Mayhew* v. *Boyce* (4).

The case made against both defendants was that they were joint tort-feasors; and as damages were assessed against Maguire alone, judgment should be entered for the plaintiffs against

(1) 3 Q.B.D. 327.
(2) [1903] 2 K.B. 337.
(3) [1904] 2 I.R. 317.
(4) 1 Stark, 423.

Maguire. Then the appellants escape: *Brinsmead* v. *Harrison* (1). The Court can compel the plaintiffs to sign judgment against the defendant Maguire: *Cassidy* v. *Kincaid* (2), cited in Bewley and Naish, Common Law Procedure Act, p. 142; *Baker* v. *Saunders* (3); Chitty's Archbold, 459. In the alternative, the Court can enter judgment for the appellants. There is not a scintilla of evidence of negligence on the part of their driver.

Denning K.C. and *Morgan Byrne*, for the plaintiffs:—

We submit that there should be a new trial of this action. The findings of the jury do not exonerate the defendant company: *Devlin* v. *Corporation of Belfast* (4). A prima facie case had been established against the driver of the lorry. If a vehicle under control does a thing outside the ordinary course, it lies upon the owner to give a truthful and satisfactory explanation: *Coughlan* v. *Monks* (5). That case followed *Flannery* v. *Waterford and Limerick Railway Co.* (6), which adopted the decision in *Scott* v. *The London and St. Katherine Docks Co.* (7). The defendants were not joint tort-feasors: *"The Koursk"* (8).

Battersby, in reply, cited *"The Bywell Castle"* (9).

MOLONY C.J.:—

If I had tried this case, I would have left it to the jury, as I think that on the question of the negligence of the defendant company there was some evidence that could properly be submitted to them. Consequently I do not see my way to give Mr. Battersby the relief he asks; but my colleagues hold a different view.

RONAN L.J.*:—

This case does not raise any question of principle. It depends on its own peculiar facts. A wall was knocked down; and the defendant Maguire was properly found guilty of the negligence which caused the damage. His car did not come into contact with the wall. The damage to the wall was caused by the impact of the lorry; and when the jury found, with the Judge's approval, that the defendant Maguire was guilty of negligence, they must have come to the conclusion that his conduct caused the lorry to knock down the wall. His conduct was such that, according to the verdict, the natural and direct consequence of it was to cause the lorry to knock down the wall. In these circumstances we cannot order a new trial. Judgment must be entered for Mr. Battersby's clients.

(1) L. R. 7 C. P. 547.
(2) 10 Ir. Jur. N. S. 176.
(3) 7 C. B. N. S. 858.
(4) [1907] 2 I. R. 437.
(5) [1918] 2 I. R. 306, 313.
(6) I. R. 11 C. L. 30.
(7) 3 H. & C. 596.
(8) [1923] P. 206. Note: affirmed on Appeal, [1924] W. N. 79.
(9) 4 P. D. 219.

* This judgment has not been revised by Ronan L.J.

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O'CONNOR L.J.:—

I concur. I do not see how the jury could have come to any other conclusion. The motor lorry was travelling on its left or proper side of the road; the driver of the motor car sounded a horn, but the driver of the lorry did not hear; the hackney car coming from the opposite direction put the defendant Maguire in a difficulty, and in attempting to pass out his car certainly struck the lorry. As to the force of that impact, there is some dispute. The defendant company say that there was a collision with the hub which caused the lorry to swerve into the wall. That may or may not be the case. Whether the collision was of a serious or of a trifling character, I am satisfied that there was no negligence on the part of the driver of the lorry. The verdict against the defendant Maguire exonerates the Merchant Warehousing Company.

Solicitor for the plaintiffs: *E. M. Lloyd.*
Solicitors for the Merchant Warehousing Co.: *Stritch & Stritch.*

C. L.

CORPORATION OF LONDONDERRY AND COUNTY OF LONDONDERRY COUNTY COUNCIL, APPELLANTS; SAMUEL A. HUNTER, RESPONDENT (1).

Appeal. (*N. I.*) 1923.

Dec. 19, 21, 1924. Feb. 13.

Court-house keeper — Salary — Appointment by High Sheriff of county — Liability of Corporation to contribute to salary—Court-house built by county situate in borough — Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm. 4, c.* 116), *sects.* 79, 110, *Sched. S.—Cork (County and City) Court-houses Act,* 1891 (54 & 55 *Vict. c.* cxi), *sects.* 5, 7—*Local Government (Ireland) Act,* 1898 (61 & 62 *Vict. c.* 37), *sects.* 4, 21, 69, *sub-s.* 3—*Local Government (Application of Enactments) Order,* 1898, *Article* 27, *sect.* 5—*Londonderry (County and County Borough) Adjustment Order,* 1901—*Londonderry (County and Borough) Adjustment Order,* 1903—*Local Government (Ireland) Act,* 1900 (63 & 64 *Vict. c.* 63), *sect.* 4.

H. was appointed Court-house keeper of a county Court-house by agreement in writing made between the High Sheriff of the county and him. The agreement provided (inter alia) that the salary should be that fixed by the Local Government (Ireland) Acts, 1898 and 1900. The half-yearly salary due to H. up to 31st December, 1919, being in arrear, H. sued the City Corporation by civil bill in the Recorder's Court for payment thereof; and the Recorder having joined the County Council and adjourned the hearing, ultimately gave a decree for £25, and struck the County Council's name out of the process. From this decree the Corporation appealed, and Dodd J. affirmed the decree as against both defendants without determining the proportions for which the defendants were liable inter se. Another half-year's salary having accrued due up to the 30th June, 1920, H. issued the civil bill in the present action, claiming payment thereof; and the Recorder made a decree in his favour against both defendants for a sum of £25 and costs.

Held by the Court of Appeal, N.I. (Sir Denis Henry, Bart., C.J., and Wilson J.), on a case stated, that the decree should be affirmed against the Corporation of Londonderry alone, the County Council of Londonderry having paid the sum for which it was liable.

CASE STATED for the opinion of His Majesty's Court of Appeal in Northern Ireland by Brown J. from the County of the City of Londonderry Summer Assizes.

The case stated is as follows:—

This case came before me at the Summer Assizes for the City of Londonderry upon an appeal by the defendants against a decree of the Recorder of Londonderry in favour of the plaintiff against both defendants for £25 and costs, being a half-year's salary as Court-house keeper of the Londonderry Court-house up to the 30th June, 1920. Upon the case being opened, it appeared that questions of considerable legal difficulty were involved, arising upon the plaintiff's contract of service and the several statutes and orders relating thereto. As the questions in issue had already been litigated without any definite conclusion being arrived at, and as the case was one which I could not determine

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satisfactorily without further argument, I agreed, upon the request of the defendants and appellants (counsel for the plaintiff not opposing), to state a case for the opinion of the Court of Appeal.

The plaintiff, Samuel A. Hunter, is the Court-house keeper of the Court-house of Londonderry. This Court-house is situated within the County Borough of Londonderry, and was built under 52 Geo. 3, c. 182, by the county, which then included the present county borough. From its completion down to the passing of the Grand Jury Act, 1836, £25 was passed each year by the Grand Jury for the City and County of Londonderry as a county at large presentment for the Court-house keeper's salary. From and after the passing of the statute 6 & 7 Wm. 4, c. 116 (the Grand Jury Act, 1836), the Court-house keeper was paid a salary of £22 per annum, made up as follows:—£8 under sect. 79 of the said Act; £14 under sect. 110 of the said Act. This continued to be the salary paid down to the passing of the Local Government (Ireland) Act, 1898. By the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), sect. 4, sub-s. 1, the business of Grand Juries and all the business of the County at Large Presentment Sessions were transferred to the County Councils constituted by the said statute; and the City of Londonderry was, by sect. 21, made an administrative county of itself as a County borough. By sect. 69, sub-s. 3, of the Local Government (Ireland) Act, 1898, it is provided that "the Court-house of a county at large when situate within a county of a city or town shall, while it continues to be such Court-house, be deemed to form part of the body of such county at large: provided that if any Court held for the county of the city or town is held in such Court-house, the Court-house shall be deemed for the purpose of the jurisdiction of that Court to be part of the body of the county of the city or town." Under this section, as interpreted by Article 15 of the schedule to the Application of Enactments Order of 22nd December, 1898, the Londonderry County Council hold the Court-house subject to all debts and liabilities affecting it, and for the same estate, interests, and purposes to which it would have been held if the Act had not passed so far as those purposes are not modified by the Act.

By sect. 4 of the Local Government (Ireland) Act, 1900 (63 & 64 Vict. c. 63), it is provided that: "In sect. 69 of the principal Act the following provision shall be inserted, and shall be deemed to have had effect as from the appointed day under the principal Act:—'For the purpose of the application of sect. 110 of the Grand Jury Act, 1836, to any county of a city constituted by this Act, that county of a city shall be treated in the same manner as the City of Cork is treated for the purposes of the said section.'"

A reference to Schedule S of the Grand Juries Act, 1836, shows that the salary of the Court-house keeper of Cork City Court-house was fixed at £20 per annum by the said section.

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By the Londonderry (County and County Borough) Adjustment Order, 1901, the Local Government Board, under powers conferred on it by sub-s. 5 of Article 27 of the schedule of the Local Government (Application of Enactments) Order, 1898, provided (inter alia) as follows:—

"1. The County Council shall provide for the maintenance and repair of the Court-house of the former county, and for the payment of all expenses in connexion with the same, in like manner as any other County Council provides for the maintenance, repair, and for the payment of expenses in connexion with the Court-house of their county: provided that the Corporation shall pay to the County Council in equal half-yearly instalments an annual sum of £125 sterling as a contribution to the cost of maintenance and repair of and to the expenses in connexion with the said Court-house."

By a further adjustment order, namely, the Londonderry (County and County Borough) Adjustment Order, 1903, the Local Government Board rescinded the said Order of 1901, but re-enacted Article No. 1, with a reduction of the Corporation's contribution to £100 per annum.

By sect. 5 of the Cork (County and City) Court-house Act, 1891, it is provided that "the Grand Jury shall present a sum not exceeding £25 for the half-yearly salary of the Court-house keeper of the county Court-house." And by sect. 7 of the same Act it is provided "that it shall be lawful for the Corporation to pay a sum not exceeding £25 for the half-yearly salary of the Court-house keeper of the City Court-house."

The plaintiff was appointed Court-house keeper of the Londonderry Court-house by agreement in writing dated the 17th day of July, 1919, between A. F. Cooke (the then High Sheriff of the County of Londonderry) and Samuel A. Hunter (the plaintiff), which agreement provided "that the salary of the said Samuel A. Hunter as such Court-house keeper shall be that fixed by the Local Government (Ireland) Acts, 1898 and 1900, provided, however, that in case of non-payment of any of the said salaries the said A. F. Cooke and his successors in office shall not in any way be personally liable for payment thereof."

The plaintiff's half-yearly salary due to the 31st December, 1919, under the said agreement being in arrear, the plaintiff sued the Corporation by civil bill in the Recorder's Court for payment thereof; and the Recorder, having joined the County Council and adjourned the hearing, ultimately gave a decree for £25, and struck the County Council's name out of the process. From this decree the Corporation appealed; and on the case coming before Mr. Justice Dodd on the 20th July, 1919, the decree was affirmed as against both defendants without determining the proportions for which the defendants were liable inter se.

Another half-year's salary having accrued due up to the 30th day of June, 1920, the plaintiff issued the civil bill in the present action, dated the 16th day of May, 1923, claiming

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payment thereof; and on the 5th day of June, 1923, the Recorder made a decree in the plaintiff's favour against both defendants for a sum of £25 and costs, from which decree both defendants have appealed.

For the plaintiff it was contended:—1. That his salary is that fixed by the said section of the Grand Jury Act, 1836; the Cork (County and City) Court-house Act, 1891; and sect. 4 of the Local Government (Ireland) Act, 1900. 2. That both defendants are liable for this salary, and that the plaintiff is in no way concerned with the liability of the defendants inter se.

It was argued on behalf of the Corporation:—1. That under the Londonderry (County and County Borough) Adjustment Order, 1903, the Corporation's contribution towards expenses in connexion with the Court-house is limited to £100, and that the effect of the said Order is to relieve the Corporation of all liability to the plaintiff. 2. That if this Order does not relieve the Corporation from liability to the plaintiff, it gives them a right of indemnity over against the County Council. 3. That sect. 4 of the Local Government (Ireland) Act, 1900, merely applied the Grand Jury Act, 1836, to the new state of affairs brought about when the City of Londonderry became an administrative county, by providing which of the classes in Schedule S to the Grand Jury Act, 1836, the new unit was to come under, thereby fixing a standard by reference to that statute only; and that consequently the Cork (County and City) Court-house Act, 1891, does not apply, and the Corporation are in any view only liable to contribute £20 per annum towards the plaintiff's salary.

The Londonderry County Council contended:—1. That the plaintiff's proper salary is £8 per annum under sect. 79 of the Grand Jury Act, 1836, together with £14 per annum under sect. 110 of that Act, as amended and applied by sect. 4 of the Local Government (Ireland) Act, 1900. 2. That on the true construction of the Londonderry (County and County Borough) Adjustment Order, 1903, the Corporation's contribution of £100 per annum is only in respect of maintenance and matters relating thereto, and does not include contribution in respect of the plaintiff's salary. 3. That if and in so far as it does include contribution towards the plaintiff's salary, the said order is ultra vires and void. 4. That if the plaintiff's contention that he is entitled to £25 each half-year is correct, the Corporation is bound to contribute £25 per annum over and above its contribution of £100 under the Adjustment Order of 1903. 5. That if the contention is correct that the plaintiff's proper salary is £8 under sect. 79 of the Grand Jury Act, 1836, together with £20 under sect. 110 as amended and applied, the Corporation is liable for this £20 under sect. 4 of the Local Government (Ireland) Act, 1900.

Having regard to the decision of Mr. Justice Dodd, I affirmed the decree, but agreed to state the present case.

The questions for the Court are:—(*a*) What is the plaintiff's

proper salary under his agreement of the 17th day of July, 1919? (*b*) Is the Corporation liable to contribute any, and, if so, what amount, towards the plaintiff's salary? (*c*) If the Corporation is liable to contribute, has it a right of indemnity against the County Council? (*d*) Is the decree appealed from right in its present form? If the decree is right in its present form, it should be affirmed, with £8 19s. 9d. costs of appeal, and £3 1s. 6d. costs in the Recorder's Court. If the decree is wrong, this case should be sent back to me, with the findings of the Court, to enable me to dispose of the matter.

Babington K.C., *Murphy K.C.*, and *M'Dermott*, for the Corporation of Londonderry:—

The plaintiff has no claim against us arising out of contract, as we were not a party to it. It would be a strange anomaly if we were liable to pay even a part of plaintiff's salary. The agreement of service can be terminated by the High Sheriff giving three months' notice to the plaintiff. The clear meaning of sect. 69, sub-s. 3, of the Local Government (Ireland) Act, 1898, is that the fabric of the Court-house is deemed to be situated in the County of Londonderry. The Corporation has no authority to raise any rate for the repair of this Court-house. The County Council have the power to use the Court-house for legal and administrative purposes. The Court-house keeper was not engaged by the Corporation, and the Court-house is not vested in that body. The plaintiff's claim must rest on his agreement. Sect 110 of the Grand Jury (Ireland) Act, 1836, casts no duty on the Corporation to pay or contribute any sum to the upkeep of the County Court-house. We submit that the Cork Court-houses Act, 1891, is not to be incorporated; there is nothing to make the Corporation of Londonderry liable to pay an officer not in their employment. Under the Londonderry (County and County Borough) Adjustment Order, 1903, the Corporation's contribution towards expenses in connexion with the Court-house is limited to £100; and we submit that the effect of the Order is to relieve the Corporation of all liability to the plaintiff. Sect. 4 of the Local Government (Ireland) Act, 1900, merely applied the Grand Jury (Ireland) Act, 1836, to the new state of affairs brought about when the City of Londonderry became an administrative county, by providing which of the classes in Schedule S to the Act of 1836 the new unit was to come under, thereby fixing a standard by reference to that statute only, and consequently the Cork Court-houses Act does not apply. We contend that the Corporation is in any view only liable to contribute £20 per annum towards the plaintiff's salary.

Lowry and *M'Guckin*, for Londonderry County Council:—

The Corporation has the right to use the Court-house. There is nothing excluding the Cork Court-houses Act, 1891, from applying. We submit that the Cork Court-houses Act was

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made applicable, and that the Corporation is liable to a sum not exceeding £25 as Court-house keeper's salary. The only question is as to the amount of the liability. We contend (*a*) that the plaintiff's proper salary is £8 per annum under sect. 79 of the Grand Jury (Ireland) Act, 1836, together with £14 per annum under sect. 110 of that Act as amended and applied by sect. 4 of the Local Government (Ireland) Act, 1900; (*b*) that on the true construction of the Londonderry (County and County Borough) Adjustment Order, 1903, the Corporation's contribution of £100 per annum is only in respect of maintenance and matters relating thereto, and does not include contribution in respect of the plaintiff's salary; (*c*) that if and so far as it does include contribution towards the plaintiff's salary, the Order is ultra vires and void; (*d*) that if the plaintiff is entitled to £25 each half-year, the Corporation is bound to contribute £25 per annum over and above its contribution of £100 under the Adjustment Order of 1903.

Begley K.C. and *J. G. Dougherty*, for the plaintiff and respondent:—

The proper salary of the plaintiff as Court-house keeper is £72 in all—£14 under Schedule S for county; £8 under sect. 79 of Grand Jury Act, 1836; £50 under Grand Jury Act as amended by the Cork Court-houses Act, 1891. Cork was taken as a standard; the plaintiff is entitled to the same salary qua city Court-house keeper as he is entitled to as county Court-house keeper. Cork City and Cork County each paid; so should Londonderry City and Londonderry County. We submit that the plaintiff's salary is that fixed by the Grand Jury Act, 1836; the Cork Court-houses Act, 1891; and sect. 4 of the Local Government (Ireland) Act, 1900; and that both appellants are liable for this salary. The plaintiff is in no way concerned with the liability of the defendants inter se.

Cur. adv. vult.

Feb. 13.

SIR DENIS HENRY, BART., C.J., delivered the judgment of the Court as follows:—

This case comes before us by way of case stated by Brown J., pursuant to the statute 27 & 28 Vict. c. 99, sect. 35. The question turns on the plaintiff's statutory rights under the various enactments. The arrangements made by the Corporation and the County Council do not bind the plaintiff, nor can they destroy any rights that the law gives him. After the passing of the Local Government (Ireland) Act, 1898, making Londonderry a county of a city, and providing for a separate commission, it was necessary to make provision by legislation for the change. This was accordingly done by sect. 4 of 63 & 64 Vict. c. 63, which is as follows: "In sect. 69 of the

principal Act the following provision shall be inserted, and shall be deemed to have had effect as from the appointed day under the principal Act: 'For the purpose of the application of sect. 110 of the Grand Jury Act, 1836, to any county of a city constituted by this Act, that county of a city shall be treated in the same manner as the City of Cork is treated for the purposes of the said section.'" The effect of this is to insert the clause mentioned in the above section in sect. 69, and to apply it to the new jurisdictions mentioned in that section as if originally placed there. The City of Cork was to be the standard of treatment for the new cities, and we have to consider how Cork was treated. Originally Cork had a separate column in the schedule to the Grand Jury Act, 1836, and this fixed the Court-house keeper's salary at £20. In 1891 an Act was passed relating to Cork City and County (54 & 55 Vict. c. cxi). We are only concerned with the city, and by sect. 7 the maximum salary was fixed at £25 for each half-year. This salary began after, and was payable under the Act of 1900. In the year 1899 an Order adapting certain Irish enactments was duly made, and referred to Schedule S. Schedule S was repeated in the schedule to the Enactments Order, with the addition of the words, "save where otherwise provided by any enactment," which saved the position of the Court-house keeper of Cork City under the Act of 1891.

We have therefore simply to give effect to the Act of 1900, which created a new standard for the cities specified in sect. 69 of the Local Government (Ireland) Act, 1898; and in my opinion what is fixed for Cork City now applies to the City of Londonderry; and the Corporation, on the argument before us, as the question was £25 if liable at all, must pay the decree for £25.

I do not see any liability for this sum on the County Council, who are only liable under Schedule S; and in my opinion the decree should be affirmed against the Corporation alone, the County Council having paid the sum for which it was liable under the schedule.

We will answer the questions as follows:—

(*a*) The Mayor, Aldermen, and Burgesses of the City of Londonderry are liable for £25 sued for each half-year.

(*b*) Yes; liable to pay entire amount up to £50 per annum.

(*c*) The Court has no right to decide now the liability inter se.

(*d*) No. Refer case back to Judge to make decree against the Mayor, Aldermen, and Burgesses of the City of Londonderry only. We order that the Corporation pay the plaintiff the costs of the case stated and argument thereon, measured at the sum of £42, the County Council to abide its own costs.

WILSON J.: I concur with the Lord Chief Justice, and have nothing to add.

Solicitor for the Corporation of Londonderry: *Sir F. H. Miller.*

Solicitor for Londonderry County Council: *W. A. Lane.*

Solicitors for respondent: *Miller & Babington.*

J. M'C.

K. B. Div.
(I. F. S.)
1924.

March 14.

RICHARDSON *v.* ARMY, NAVY, AND GENERAL ASSURANCE ASSOCIATION, LTD. (1).

(1924. No. 743.)

Practice—Service of writ of summons out of the jurisdiction—Contract made in Ireland—Insurance policy—Fraud going to root of contract—Arbitration—Condition precedent—Motion to stay action.

An insurance policy contained (inter alia) the following clauses:—"7. Any material misrepresentation or concealment of or omission to state any circumstance or to give any information material to be known for estimating the risk or the rate of premium or in respect of any claim by or on behalf of the insured shall render this policy absolutely void, and all premiums thereon shall be forfeited to the Association." "12. If any difference or dispute of any kind whatsoever shall arise between the insured or his legal personal representatives and the Association in respect of this policy, or in respect of any claim or of any matter or thing or liability arising or alleged to have arisen hereunder or otherwise connected herewith, directly or indirectly, the same shall be referred to arbitration, in accordance with the provisions of 'The Arbitration Act, 1889,' or any Act or Acts amending that Act. The due observance and fulfilment of the provisions and conditions of this policy shall be a condition precedent to any liability of the Association under this policy; and the hearing of any dispute so referred to arbitration shall be heard at some place within a radius of three miles of the head office of the Association in London."

The insured, a plaintiff in an intended action against the insurers, on foot of the policy was given liberty to issue and serve the writ out of the jurisdiction. The insurers applied to set aside the order on the ground that the contract was not made within the jurisdiction of the Court, and, alternatively, to stay the action pending the decision of the matter in dispute by arbitration. The insurers further alleged that material misrepresentations were made by the insured in his proposal, and that consequently the policy was void under clause 7, and that therefore a dispute had arisen which, under clause 12, should be referred to arbitration.

Held, that (1) on the facts of the case the contract was made within the jurisdiction; (2) the question of misrepresentation was within the arbitration clause in the policy; but there being no express provision making the holding of an arbitration a condition precedent to an action, and an important question of law being involved, viz., whether the Arbitration Act, 1889 (52 & 53 Vict. c. 49), can be made applicable to an Irish contract, the Court, in the exercise of its discretion, refused to stay the action.

The question whether the Arbitration Act, 1889 (52 & 53 Vict. c. 49), can be made applicable to an Irish contract was considered, but not decided.

MOTION to set aside an order of Mr. Justice Samuels, dated 11th January, 1924, giving leave to serve the writ in this case in England. The defendants asked to have the order set aside on the ground that the contract was not made within the jurisdiction of the Court; and, in the alternative, for an order staying the action pending the decision of the matter in dispute by arbitration, in the manner provided for by the contract.

The plaintiff was a merchant, carrying on business in the City of Dublin, and the defendants were an insurance company, having their head office in London.

(1) Before MOLONY C.J. and DODD J.

On the 20th June, 1922, the plaintiff was supplied by Messrs. Allen V. Kidd & Co., Ltd., who are insurance brokers, carrying on business at 14 Dawson Street, Dublin, with a proposal form for what is known as the "Open Road Motor Car Policy." The plaintiff filled up the form, specifying the make of the car sought to be insured as a Ford truck, value for £300, and giving other particulars, as required by the form; and he signed a declaration at the foot of the form to the effect that the particulars stated were true, and that the declaration and answers should be the basis of the contract between him and the association. And he further agreed that the liability of the association was not to commence until the acceptance of the proposal had been formally intimated by the association and the premium paid and accepted. Messrs. Kidd & Co. having received the proposal, gave the plaintiff a covering note on behalf of the association, and forwarded the proposal to London in the usual course of business. The defendants accordingly, on the 21st June, 1922, executed the policy, which followed the open road policy, with, however, three modifications. The plaintiff subsequently paid the premium to Messrs. Kidd & Co. in Dublin.

Battersby K.C. and *Campbell,* for the defendants.

FitzGibbon K.C. and *Newett,* for the plaintiff.

MOLONY C.J., having stated the facts as above set out, continued:—

It has been contended that the contract was complete upon the execution of the policy in London; but this view is not correct, because, according to the policy itself (following in this respect the proposal), the risk does not commence until payment of the premium by the assured to the association.

The company accepted the risk subject to the payment of the premium by executing and sending the policy to Messrs. Kidd & Co., Ltd., and the latter firm thereupon transmitted the policy to the plaintiff, who paid the premium to Messrs. Kidd & Co., Ltd., and obtained from them a receipt for the amount. It has been contended on behalf of the defendants that Messrs Kidd & Co. were in no sense agents of the defendants in the matter for the purpose of soliciting business; but it is admitted in the affidavit of Mr. Lawton, the managing director of the defendant company, that they were authorized to accept the premium after acceptance of the risk by the company. If they were agents for the defendants, the contract was complete when the money was paid to them in Dawson Street; if they were agents for the plaintiff, the contract was complete when they posted the letter containing the amount of the premium to the defendants; and in either case the contract was made in Ireland, and the plaintiff is entitled to bring his action here, which is admittedly the most convenient venue.

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The defendants, however, further contend that even assuming that the contract was made in Ireland, they are entitled to have the action stayed pending the holding of the arbitration provided for by one of the conditions indorsed on the policy. They allege that material misrepresentations were made by the plaintiff in his proposal, and that consequently the policy was absolutely void under clause 7 of the general conditions indorsed on the policy, and that therefore a dispute or difference has arisen which, under clause 12 of the general conditions, should be referred to arbitration. The plaintiff replies that repudiation of the claim on the ground that the policy was void by reason of misrepresentation precludes the defendants from setting up the arbitration clause as a bar to the action; and he relies upon the case of *Jureidini* v. *The National British and Irish Millers' Insurance Co., Ltd.* (1). In that case the policy contained a clause providing that if the claim should be in any respect fraudulent, all benefits under it should be forfeited; and there was a further clause providing that any difference which might arise as to the amount of any loss or damage should be submitted to the decision of an arbitrator. Lords Dunedin, Parker, and Parmoor held that the arbitration clause in that case referred to existing disputes and differences about the amount of loss sustained, and had no application to a case where fraud was relied on, which went to the root of the action. Lord Haldane was inclined to go a little further, and said (p. 505): "Speaking for myself, when there is a repudiation which goes to the substance of the whole contract, I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being in force."

Jureidini's Case (1) came to be considered in this Court in the case of another policy of the defendant company: *Ballasty* v. *Army, Navy, and General Assurance Association, Ltd.* (2). The defendants repudiated liability in that case on the ground of misrepresentation under condition 7, which was in precisely the same terms as in the present policy, and sought to stay the action pending a reference to arbitration; and it was held by the Divisional Court (Madden and Pim JJ.) that where the defendants claimed under clause 7 that the policy was void, the dispute could not be referred to arbitration. Since the time of *Ballasty's Case* (2) clause 11 of the conditions indorsed on policies issued by the defendant company has undergone a modification. In *Ballasty's Case* (2) the words were: "If any difference or dispute of any kind whatsoever shall arise between the insured or his legal personal representative and the Association in respect of any claim or of any matter or thing or liability arising or alleged to have arisen hereunder or otherwise connected herewith, directly or indirectly, the same shall be referred to arbitration, in accordance with the provisions of the Arbitration Act, 1889, or any Act or Acts amending that Act."

(1) [1915] A. C. 499. (2) 50 I. L. T. R. 115.

In the present case the words are: "If any difference or dispute of any kind whatsoever shall arise between the insured or his legal personal representatives and the Association in respect of this policy or in respect of any claim or of any matter or thing or liability arising or alleged to have arisen hereunder or otherwise connected herewith, directly or indirectly, the same shall be referred to arbitration, in accordance with the provisions of the Arbitration Act, 1889, or any Act or Acts amending that Act."

It will be seen that the difference between the two clauses is that in the present case the words, "in respect of this policy," have been inserted; and it is contended that the insertion of these words distinguishes the present from *Jureidini's Case* (1), and brings the matter of a dispute under clause 7 within the purview of the arbitration clause.

In *Gaw* v. *British Law Fire Insurance Co.* (2) the clause dealing with arbitration provided that "all differences arising out of this policy shall be referred to the decision of an arbitrator"; and it was held by the Court of Appeal (Walker C., FitzGibbon and Holmes L.JJ.) that the issue of fraud was a difference arising out of the policy capable of being referred to arbitration. This was before *Jureidini's Case* (1); but after *Jureidini's Case* (1) the words of an arbitration clause in identical terms came to be considered by the Court of Appeal in England in the case of *Stebbing* v. *The Liverpool and London and Globe Insurance Co., Ltd.* (3). In that case the policy contained a clause referring to the decision of an arbitrator "all differences arising out of this policy," being the same words exactly as in *Gaw's Case* (2). There was also a condition in the policy providing that if any false declaration should be made or used in support of a claim, all benefit under the policy should be forfeited. The company put forward a case that statements in the proposal and declaration were false; and it was held by the Court that the truth or untruth of statements was a matter to be referred to an arbitrator. Viscount Reading C.J., in giving judgment, said: "In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material, and that they induced the contract. If they succeed in escaping liability, that is by reason of one of the clauses in the policy. In resisting the claim they are not avoiding the policy, but relying on its terms. In my opinion, therefore, the question whether or not the statement is true is a question arising out of the policy."

The same point came to be considered in the case of *Woodall* v. *The Pearl Insurance Co., Ltd.* (4). In that case the policy incorporated the proposal and declaration, and provided that any suppression, misrepresentation, or misstatement of fact in such

(1) [1915] A. C. 499.
(2) [1908] 1 I. R. 245.
(3) [1917] 2 K. B. 433.
(4) [1919] 1 K. B. 593.

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written proposal and declaration should, ipso facto, render the policy null and void; and referred to arbitration any question which should arise "touching this policy or the liability of the company thereunder." The company relied on an alleged misstatement in the proposal, and claimed arbitration; and it was held that they were entitled to do so. Bankes L.J., in his judgment, after referring to the authorities, says (at p. 604): "The next question is whether the case is governed by *Jureidini's Case* (1). I am not able to agree with the learned Judge upon this point. In considering this part of the case, it is necessary to draw a clear and sharp distinction between two classes of cases. One class is where the insurance company is repudiating the contract in the sense that they are disputing the existence of any binding contract at all. *Jureidini's Case* (1) falls within that class. The other is where the company is repudiating liability under the contract, but is accepting the existence of the contract as a binding contract. *Stebbing* v. *The Liverpool and London and Globe Insurance Co., Ltd.* (2) is an instance of the latter class. Within which class does the present case come?" The Court of Appeal unanimously held that the case was not governed by *Jureidini's Case* (1), and the reasons are succinctly put by Warrington L.J. in his judgment (p. 609): "It is said that the learned Judge was bound to decide as he did—and he said so himself—because of a decision of the House of Lords in *Jureidini* v. *The National British and Irish Millers' Insurance Co.* (1). That, however, was a totally different case. In the first place there was a total repudiation of the contract; in the second place the arbitration clause did not extend to differences as to liability under the contract, it only extended to a difference as to the amount payable under the policy. The consequence was that if the contention of the Insurance Company in that case had prevailed there would have been no means of deciding the question of the liability of the Company. According to their contention it could not have been decided by the Courts, and by the terms of the arbitration it could not have been decided by arbitration. That difficulty was pointed out by Lord Atkinson and Lord Parmoor, and I think the same difficulty occurred to Lord Dunedin . . . The present case is much more like *Stebbing* v. *The Liverpool and London and Globe Insurance Co.* (2), where it was held that what the Insurance Company did was not to repudiate the contract altogether but to deny liability by virtue of some provision in the contract itself, and at the same time to insist upon having the question whether there was that liability decided by arbitration."

I am of opinion that the question of misrepresentation in the present case is within the arbitration clause, but it is to be noted that there is no express provision in the clause making the holding of an arbitration a condition precedent to an action.

(1) [1915] A. C. 499. (2) [1917] 2 K.B. 433.

The question, however, remains whether the Arbitration Act of 1889 can be made applicable to an Irish contract? This important point was considered by this Court in *Lowden* v. *The Accident Insurance Company* (1). The policy in that case contained the words "all the provisions of the Arbitration Act, 1889, and the Arbitration Act (Scotland), 1894 (where applicable), and such Arbitration Acts as may be in force for the time being shall apply to any such arbitration"; and it was held by this Court that the provisions of the Arbitration Act of 1889 did not apply, and that the provisions of the Common Law Procedure (Ireland) Act, 1859, did apply, as being apparently included in the words "such Arbitration Acts as may be in force for the time being."

A similar point came to be considered by the Court of Appeal in *Wilson* v. *The National Live Stock Insurance Company, Ltd.* (2), in which, in an Irish contract, the arbitration clause provided that the proceedings were "to conform to the provisions in that behalf contained in the Arbitration Act, 1889, or any then subsisting statutory modifications thereof"; and there was also a provision similar to here that the seat of the arbitration was to be in England. Boyd J. refused to stay proceedings in the action, and the defendants appealed to the Court of Appeal. In giving judgment Holmes L.J. said:—"In reference to the arbitration clause, I think there arises a question of importance that has never been decided. I have said we must assume that the contract between the plaintiff and the defendants is an Irish contract, but by its terms the arbitration must be an arbitration in England governed by the English law dealing with arbitrations and awards, which differs substantially from the law in this country relating thereto. The plaintiff desires to argue that he is not bound by this portion of the contract; or, at least, it does not amount to a condition precedent, and in my opinion this is a fit subject for argument and for the decision of the highest tribunal if either party so requires. Therefore I agree with Boyd J. in holding that the action ought not to be stayed. The defendants can raise the question in controversy by their defence, and I wish it to be understood that I have formed no opinion thereon."

Having regard to the importance of the question as to the effect of the arbitration clause, I do not think that, in the exercise of our discretion, we ought to stay this action, but, like Holmes L.J., I wish to be understood as not expressing any opinion upon the point, more especially as some of the cases bearing upon it, including *Spurrier* v. *La Cloche* (3), have not been opened to us in argument.

(1) 43 I. L. T. R. 277. (2) 48 I. L. T. R. 77. (3) [1902] A. C. 446.

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DODD J. :—

I desire to add a word or two on both the matters dealt with by my lord.

I am of opinion that the contract was made in Ireland, for the reasons given by my lord; and I think if we are right in that, the construction of the contract becomes modified by that fact. But I do not mean to decide even that. It was decided so against me in *Lowden* v. *Accident Insurance Co.* (1). In Bunyon sixteen cases are quoted. I have gone through them. In *Ballasty* v. *Army, Navy, and General Assurance Association* (2), and in *Jureidini* v. *The National, British, and Irish Millers' Insurance Co., Ltd.* (3), there was no such clause. In all the cases cited where the Court declined to interfere there was a clear clause making the award of the arbitrator a condition precedent to an action.

In *Spurrier* v. *La Cloche* (4), to which my lord referred, the clause is :—"It is hereby expressly declared to be a condition precedent to the liability of the company in respect of any claim under this policy that the claim shall, if not admitted, be referred to and determined by such arbitrator, arbitrators, or umpire as aforesaid, and the claimant shall have no right of action against the Company except for the amount of the claim, if admitted, or the amount, if any, awarded by the award of such arbitrator, arbitrators, or umpire."

The case of *Wilson* v. *The National Live Stock Insurance Co.* (5) referred to by my lord is a strong one. There was in the policy in that case a clause providing that an award thereunder was to be a condition precedent to the liability of the Company to pay any claim under the policy. And notwithstanding that clause the Court of Appeal held it was open to argument whether the provision applied; the Lord Chancellor and Cherry L.J. concurred with Holmes L.J.

The policy in this case has not such a clause. The words "condition precedent" do appear, but in this way: "The due observance and fulfilment of the provisions and conditions of this policy shall be a condition precedent to any liability of the Association under this policy." There is no express provision that an award is to be a condition precedent. It would seem, therefore, a stronger case for the refusal to stay than *Wilson* v. *The National Live Stock Insurance Co., Ltd.* (5). Even a condition precedent can be waived, and it will be open to the plaintiff to raise such an issue upon the facts: see Bunyon, 7th ed., p. 246.

(1) 43 I. L. T. R. 277.
(2) 50 I. L. T. R. 115.
(3) [1915] A. C. 499.
(4) [1902] A. C. 446.
(5) 48 I. L. T. R. 77.

The objection here was not raised apparently until after a contested action. But that seems the only question of fact. The contention of the Association as to misrepresentation is one I find hard to follow. Whether the non-answering of a question amounts to "misrepresentation" is mainly, I should think, a question of law. But if it be a mixed question of law and fact, it will be open to the defendants at the trial.

Once we have arrived at the conclusion that this is a contract made in Ireland—an Irish contract—and that we are not compelled to stay the action, it is clearly one more fit to be tried by a judge and jury than by arbitration. Every issue will be open under this decision to both parties at the trial.

Solicitors for the defendants: *Stritch & Stritch.*
Solicitors for the plaintiff: *Stanuell & Son.*

H. H.

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April 8.

THE KING (O'CONNELL) *v.* THE MILITARY GOVERNOR OF HARE PARK CAMP (1).

Habeas corpus—Liberty of the subject—Constitution of the Irish Free State, Articles 64, 70, and 72—Public Safety (Powers of Arrest and Detention) Temporary Act (I.F.S.), 1924—Power of the Oireachtas to authorize the detention of untried persons—Judicial powers—Due course of law.

The powers of the Oireachtas of the Irish Free State cover the whole area of self-government within the whole area of the Irish Free State, and include power to authorize the detention of untried persons.

Within the whole area of the Irish Free State the Oireachtas is a free and unfettered Legislature, and there is nothing in the Treaty or the Constitution or the statute confirming them to limit the power of the Oireachtas to authorize such detention.

Attorney-General for Ontario v. *Attorney-General for Canada* ([1912] A.C. 571) followed.

The Public Safety (Powers of Arrest and Detention) Temporary Act (I.F.S.), 1924, is intra vires the Constitution of the Irish Free State.

Per Pim J.: Because it was a temporary Act, made in abnormal times, and for a temporary purpose.

HABEAS CORPUS.

John Daniel O'Connell was arrested at Lismore House, Tralee, Co. Kerry, on 26th February, 1923, by troops of the Irish Free State and was taken to Hare Park Internment Camp, Co. Kildare, where he has since been detained in pursuance of an Order dated the 1st February, 1924, of General Richard Mulcahy, then Minister of Defence and a member of the Executive Council of Saorstat Éireann. The Order purported to have been made under the provisions of the Public Safety (Powers of Arrest and Detention) Temporary Act, 1924 (No. 1 of 1924). An application on behalf of O'Connell was made for a writ of habeas corpus directed to the Military Governor of Hare Park Internment Camp requiring him to produce the body of the said John Daniel O'Connell before the Court, and certify in writing as to his detention.

M. Comyn K.C. and *Gavan Duffy,* for the prosecutor.

T. Sullivan K.C. and *Costello,* for the respondent.

MOLONY C.J.:—

This was an application on behalf of John Daniel O'Connell for a writ of habeas corpus directed to the Military Governor of Hare Park Internment Camp requiring him to produce the body of the said John Daniel O'Connell before the Court, and to certify in writing as to the cause of his detention.

It appears from the affidavit of Mrs. Joan O'Connell, wife of John Daniel O'Connell, that her husband was arrested at

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Lismore House, Tralee, on the 26th February, 1923, by troops of the Irish Free State, and that since that date he has been and is now detained at Hare Park Internment Camp, in the County of Kildare, by the Military Governor of the said Camp.

In reply to the affidavit of Mrs. O'Connell, Commandant Michael Love, the Military Governor of Hare Park Internment Camp, has filed an affidavit stating that the said John Daniel O'Connell is at present detained in his custody in pursuance of an Order dated the 1st February, 1924, of General Richard Mulcahy, Minister of Defence and a member of the Executive Council of Saorstat Éireann.

The said Order purports to have been made under the provisions of the Public Safety (Powers of Arrest and Detention) Temporary Act, 1924, and it has been argued with great ability and force by Mr. Comyn and Mr. Gavan Duffy that this Act was in contravention of the powers conferred on the Oireachtas, and that consequently the Order made thereunder was void and of no effect.

In order to test the validity of the arguments used on behalf of the prosecutor in this case it is necessary in the first instance to refer to the Articles of Agreement for a Treaty between Great Britain and Ireland, dated 6th December, 1921, and the subsequent legislation giving legal effect to the said Articles of Agreement.

Article 1 of the Treaty is as follows:—

"Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order, and good government of Ireland, and an executive responsible to that Parliament, and shall be styled and known as the Irish Free State."

It was thought necessary to define the position of the Irish Free State in relation to the Imperial Parliament and Government, and accordingly it was provided by Article 2 that:—

"The law, practice, and constitutional usage governing the relationship of the Crown or of the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State."

The power to make laws for the peace, order, and good government of Ireland was limited only by the provisions of Article 16, which prohibited the making of any law so as either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof.

This Treaty was duly approved by the Imperial Parliament and by a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland, and was duly ratified by the necessary legislation.

It then became the duty of Dáil Éireann, sitting as a Constituent Assembly, to frame a Constitution for the Irish Free

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State, and this was accordingly done and embodied in the Constitution of the Irish Free State (Saorstat Éireann) Act, No. 1 of 1922. Sect. 1 of the constituent Act provides that the Constitution set forth in the first schedule thereto shall be the Constitution of the Irish Free State; and sect. 2 provides that the Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the second schedule thereto; and that if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the scheduled Treaty it shall to the extent only of such repugnancy be absolutely void and inoperative.

The Constitution was duly approved of by the Imperial Parliament by the Irish Free State Constitution Act, 1922 (13 Geo. 5, Sess. 2, c. 1), subject to a condition in sect. 4 that nothing in the Constitution should be construed as prejudicing the power of Parliament to make laws affecting the Irish Free State in any case where, in accordance with constitutional practice, Parliament would make laws affecting other self-governing Dominions.

The effect then of this legislation is that the Oireachtas has the sole and exclusive power of making laws for the peace, order, and good government of the Irish Free State subject only to the provisions of the Treaty and the Constitution, and the power of the Imperial Parliament to make laws affecting the Irish Free State in any case where, in accordance with constitutional practice, the Imperial Parliament would make laws affecting other self-governing Dominions.

After the Irish Free State came into being it was beset with many difficulties, and, as was recited in the Public Safety (Emergency Powers) Act, No. 28 of 1923, a state of rebellion had been created; and for the purpose of suppressing such rebellion the military defence forces of Saorstat Éireann were entrusted by the Executive Government with the task of securing the public safety and restoring order and the rule of law throughout the country. In suppressing the rebellion the Military Authorities arrested many persons, including the said John Daniel O'Connell, some of whom made applications to this Court under Article 6 of the Constitution for writs of habeas corpus.

As stated by me in my judgment in the Court of Appeal in *The King* (*O'Brien*) v. *Military Governor, North Dublin Union Internment Camp* (1):—"The Article of the Constitution is only declaratory of the pre-existing law, and accords with the decision of the King's Bench Division in *The King* v. *Allen* (2); *The King* (*Garde and Others*) v. *Strickland* (3); *The King* (*Ronayne and Mulcahy*) v. *Strickland* (4); *The King* (*Johnstone*) v. *O'Sullivan* (5) affirmed by this Court (6). To the same effect is the decision of the Master of the Rolls in *The King* (*Childers*) v.

(1) [1924] 1 I. R. 32-38.
(2) [1921] 2 I. R. 241.
(3) [1921] 2 I. R. 317-334.
(4) [1921] 2 I. R. 333.
(5) [1923] 2 I. R. 13.
(6) [1923] 2 I. R. 17.

The Adjutant-General of the Forces of the Irish Provisional Government (1). The Court is bound, when its jurisdiction is invoked, to decide whether or not there exists a state of war or armed rebellion; but once it so decides, it has no power to prohibit, control, or interfere with any act of the military forces, whether it is a matter of detention, as in the present case, or the execution of a capital sentence after trial by a so-called military Court, as in Allen's case and Childers's case, or the execution of a person without trial as in Rory O'Connor's case."

In that case the Court of Appeal held that a state of war ceased to exist on the 31st July, 1923, and the necessary effect of that decision was that all persons then in military custody should be released unless statutory provision was made for their detention. The Public Safety (Emergency Powers) Act (I.F.S., No. 28 of 1923) was passed by the Oireachtas immediately afterwards, and came into operation on the 3rd August, 1923; and sect. 3 of the last-mentioned Act provided for the detention in custody of persons then in military custody, either by the military authorities or under an order of an Executive Minister. This Act, however, was only to remain in force for six months after the passing thereof, and, accordingly, it became necessary to make further provision for the detention of the persons who still remained in military custody. The Public Safety (Powers of Arrest and Detention) Temporary Act (I.F.S., No. 1 of 1924) was then passed, sect. 4 of which enacts as follows:—

"Every person who is now detained in military custody, or held as a military prisoner or captive, and has not, before the passing of this Act, been sentenced to a term of imprisonment or penal servitude by any tribunal established by the military authorities, may be detained in custody under this Act under an order of an Executive Minister, if such Minister is of opinion that the public safety would be endangered by such person being set at liberty."

The Act came into operation on the 1st February, 1924, and is to continue in force for one year from that date. On the same day General Mulcahy made an Order in the following terms:—"Whereas John D. O'Connell (hereinafter referred to as the prisoner) was at the date of the passing of the Public Safety (Powers of Arrest and Detention) Temporary Act, 1924, detained in military custody. And whereas the prisoner was not before the passing of the said Act sentenced to any term of imprisonment or penal servitude by any tribunal established by the military authorities. And whereas I am of opinion that the public safety would be endangered by the prisoner being set at liberty. Now I, Risteard Ua Maolchatha, an Executive Minister, within the meaning of the said Act, do hereby order and direct that the prisoner be detained in custody under the said Act until further order, but not after the expiration of the said Act."

(1) [1923] 1 I. R. 5.

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It is admitted that the said John Daniel O'Connell was then in military custody, and had not been sentenced before the passing of the Act to any term of imprisonment or penal servitude, and that consequently the conditions precedent to the exercise of the jurisdiction by an Executive Minister had been satisfied; but it is contended that there was no power in the Oireachtas to authorize the detention of any person, except he should be first tried in due course of law and his case adjudicated upon before a Judge and jury, or, in respect of minor offences, by a Court of summary jurisdiction. It was argued that the statute is absolutely void and inoperative, because it violates provisions contained in Articles 64, 70, and 72 of the Constitution.

Under Article 64 the judicial power of the Irish Free State is to be exercised and justice administered in the public Courts established by the Oireachtas by Judges appointed in the manner thereinafter provided. Article 70 provides in express terms that:—

> "No one shall be tried save in due course of law, and extraordinary Courts shall not be established, save only such military tribunals as may be authorized by law for dealing with military offenders against military law."

And Article 72 further provides that:—

> "No person shall be tried on any criminal charge without a jury, save in the case of charges in respect of minor offences triable by law before a Court of summary jurisdiction; and, in the cases of charges for offences against military law, triable by Court-martial or other military tribunals."

It is expressly provided by Article 65 that the judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution; and accordingly it is within the power of the Court to examine any act of the Oireachtas for the purpose of seeing whether it violates the provisions of the Constitution.

It was contended in the first instance by Mr. Comyn that sect. 4 of the statute is an attempt to deprive the High Court of its power to order the issue of a writ of habeas corpus. The same argument was urged in the House of Lords in *The King* v. *Halliday* (1) in reference to Order 14 (*b*) made under the Defence of the Realm (Consolidation) Act, 1914 (5 Geo. V, c. 8), which, in its essential features, closely resembles the section in question, and is thus conclusively dealt with by Lord Atkinson (page 272): "It was also urged that this Defence of the Realm (Consolidation) Act, 1914, and the Regulations made under it, deprived the subject of his rights under the several Habeas Corpus Acts. That is an entire misconception. The subject retains every right which those statutes conferred upon him to have tested and determined in a Court of law by means of a writ of habeas corpus addressed to the person in whose custody he may be, the legality of the order or warrant by virtue of

(1) [1917] A. C. 260.

which he is given into or kept in that custody. If the legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if intra vires, do not infringe upon the Habeas Corpus Acts in any way whatever, or take away any rights conferred by Magna Charta, for the simple reason that the Act and these orders become part of the law of the land''; or, in words of Article 6 of our Constitution, are ''in accordance with law.''

Under the Treaty Ireland is to have the same constitutional status as the Dominion of Canada, and the law, practice, and constitutional usage governing the relationship of the Crown, or the representative of the Crown, and the Imperial Parliament to the Dominion shall govern their relationship to the Irish Free State.

Under sect. 91 of the British North America Act, 1867 (30 & 31 Vict., c. 3), which created the Dominion of Canada, the legislature of the Dominion was empowered to make laws ''for the peace, order, and good government of Canada'' in all matters not coming within the classes of subjects assigned by sect. 92 of the Act to the legislatures of the provinces exclusively. In Ireland we have the same general words, unrestricted by any powers to provincial legislatures; and in considering whether a particular enactment is invalid we can accept the canons of construction laid down by the Privy Council in *The Attorney-General for Ontario* v. *The Attorney-General for Canada* (1). In giving judgment in that case Earl Loreburn L.C. said (page 581):—''In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.'' And again (page 583):—''In the interpretation of a completely self-governing Constitution founded upon a written organic instrument such as the British North America Act, if the text is explicit, the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself

(1) [1912] A. C. 571.

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(as, for example, a power to make laws for some part of His Majesty's Dominions outside of Canada), or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominions or to the provinces within the limits of the British North America Act. It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government and obviously bestowed by the British North America Act. Indeed it might ensue from the breach of almost any power.''

Following this decision it seems to me that the powers of the Oireachtas cover the whole area of self-government within the whole area of the Irish Free State, and do include power to make such a provision as is sought to be here impeached. The Oireachtas gave power to enable a person who had already been detained in military custody to be detained for a limited time under an order of an Executive Minister, if such minister was of opinion that the public safety would be endangered by the person being set at liberty. The stringency of the jurisdiction was to some extent modified by the creation of an Appeal Council under sect. 5, to which it is open to the prosecutor in this case to appeal. The power was less drastic than that contained in Order 14 (*b*) of the Defence of the Realm (Consolidation) Regulations in reference to persons whom there might be any reason to suspect of being disposed to help the enemy, and the scope and object of such an Order has been explained by Lord Finlay C. in *The King* v. *Halliday* (1) in terms which are peculiarly applicable to the present case. He said (page 269):—''One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restrictions on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy. It is to this that Regulation 14 (*b*) is directed. The measure is not punitive but precautionary. It was strongly urged that no such restraint should be imposed except as the result of a judicial inquiry, and indeed counsel for the appellant went so far as to contend that no regulation could be made forbidding access to the seashore by suspected persons. It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law. No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. The duty of deciding this question is, by the Order, thrown upon the Secretary of State, and an advisory committee, presided over by a Judge of the High Court, is provided to bring before him any grounds for thinking that the Order may properly be revoked or varied.''

In reference to this case, Mr. Gavan Duffy has strongly

(1) [1917] A. C. 261.

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pressed on us certain passages in the dissenting judgment of Lord Shaw: With many, and indeed most of the statements in Lord Shaw's judgment, I respectfully concur, but it must be remembered that his arguments were confined to the question whether the Regulation 14 (*b*) was ultra vires the statute, and nobody questioned the power of the Imperial Parliament to make such a provision by a statutory enactment.

It has, however, been contended here that the Oireachtas cannot do what the Imperial Parliament might do, and this argument is based on the assumption that it is not a free and unfettered legislature. The answer is that within the whole area of the Irish Free State it is a free and unfettered legislature, and that there is nothing in the Treaty or the Constitution, or the statutes confirming same, which limits the power of the Oireachtas to make such a provision as is here impugned.

Mr. Comyn based a great deal of his argument on the case of *Sprigg* v. *Sigcau* (1), but a consideration of the facts of that case will show how little bearing it has on the present. That case came before the Privy Council on appeal from a decision of the Supreme Court of the Cape of Good Hope, and turned upon the interpretation of sect. 2 of the Pondoland Annexation Act, 1894, which gave authority to the Governor to add to the existing laws already proclaimed and in force in the territories annexed such laws as he "shall from time to time by proclamation declare to be in force in such territories."

In 1895 the Governor issued a proclamation which he stated was made "in virtue of the powers vested in me by law," including the Pondoland Annexation Act, and by this proclamation he purported to set aside the established law of Pondoland with respect to arrest, trial, conviction, and punishment, and condemned the respondent (Sigcau) untried and unheard to imprisonment; the place and duration of his captivity being left to the uncontrolled will of the Governor. Sigcau appealed to the Supreme Court of the Cape of Good Hope, who were of opinion that there was no lawful authority for his detention, and ordered his immediate discharge. An appeal being taken to the Privy Council by special leave, the Privy Council held that sect. 2 of the Pondoland Annexation Act did not, according to its true construction, authorize the Governor to make new laws, but only to transplant to the new territories and enact there such laws as were already in force in other parts of the colony; and that consequently the proclamation was ultra vires of any authority conferred upon the Governor by sect. 2. Lord Watson sums up the grounds of the judgment in a few words (page 248):—"Their Lordships think it sufficient for the disposal of this appeal to point out that the proclamation of which the respondent, Sigcau, complains exceeds any delegated authority which was possessed by the Governor in two particulars

(1) [1897] A. C. 238.

Appeal. (*I. F. S.*) 1924.

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which constitute its leading features. It is a new and exceptional piece of legislation, differing entirely in character from any of the laws, statutes, and ordinances which he is authorized to proclaim, and it in substance repeals the whole provision of the existing law with respect to criminal proceedings in so far as the respondent is concerned. Upon these grounds their Lordships are of opinion that the issue of the proclamation was an illegal and unwarrantable act, and that the Supreme Court of the colony did right in refusing to give effect to it and in liberating the respondent."

The Privy Council never held that it was not within the competence of the Parliament of the Cape of Good Hope to make a statute in the terms of the impeached proclamation; and indeed Mr. Asquith, in the course of his argument for the respondent, Sigcau, expressly admitted that the legislature might pass an act to deprive a man of his liberty, but that this had not been done in the Pondoland Annexation Act.

Mr. Gavan Duffy has based his argument on three main contentions: 1, That the Order in question here was an exercise of "Judicial Power" within Article 64 of the Constitution, and was void because such power could only be exercised in public Courts by Judges appointed in the prescribed manner; 2, That the Executive Minister in making such an order was acting as "an extraordinary Court" and came within the prohibition in Article 70; and 3, That the Executive Minister was not acting in due course of law, therefore violated Article 70, which provides that no one shall be tried save in due course of law; and Article 72, which provides that no person shall be tried on any criminal charges without a jury, save for minor offences triable by law before a Court of summary jurisdiction.

As regards 1, what are judicial powers? A statutory definition will be found in sect. 3 of the Vice-Admiralty Courts Amendment Act, 1867, which prescribes that "judicial powers" shall mean all powers and authorities which may be lawfully exercised by, and all duties by law imposed upon, any such judge in the trial, hearing, and progress of any cause. Within this definition, or anything like it, the order of the Executive Minister certainly does not come. He is to form an opinion on whatever materials he deems sufficient; but there is no cause, no trial, no hearing, nothing except the inner consciousness of the minister expressed in the written order. The power given by sect. 4 is not judicial power. It is a power, in its nature arbitrary, conferred by the legislature to meet a threatened danger to the State, and limited to particular persons and for a limited time, and in this connexion I may repeat the words of Lord Finlay in *The King* v. *Halliday* (1): "It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate that a Court of law."

(1) [1917] A. C. 269.

As regards 2, the matter is still clearer. What is a Court? "Curia, Court, is a place where justice is judicially administered, and is derived a cura quia in curiis publicis curas gerebant": Co. Litt., 58 (*a*). Or, as it is put in Termes de la Ley sub voce Court:—"Court est diversment prise, ascun soits p le meason ou le Roy est present ove son ordinary attendants; et auxy le lieu ou justice est judicialment ministre." "Court is diversely taken, sometimes for the house where the King remains with his ordinary retinue; and also the place where justice is judicially ministered."

What is necessary in order to have justice judicially administered? The answer will be found in the judgment of Lord O'Brien in *The King* (*Martin*) v. *Mahony* (1):—"In all matters of procedure the essentials of justice must be observed. It is one of the essential requirements of justice that a charge shall be duly formulated, that an accused person shall have notice of it, and that he should be given an adequate opportunity of defending himself. Such matters are not mere formalities; they are the essential requirements of justice."

It is in my opinion impossible to say that the minister in making the order in the present case was acting as a court, ordinary or extraordinary, and Article 70 has no application. The phrase "extraordinary Court" was apparently used to prevent the creation of Courts such as were created during the early part of the last century by what were commonly known as the Insurrection Acts, which gave power to a Serjeant-at-Law or one of His Majesty's Counsel to try a great number of offences without any grand or petty jury, and without any bill found, and to sentence the persons whom they consider guilty to transportation or imprisonment.

As regards 3, the phrase "in due course of law" simply means in accordance with the law then in force: see *King* v. *Halliday* (2).

I am of opinion that the order made in the present case was made "in due course of law," because it was authorized by the statute, and that statute was within the powers of the Legislature. There was clearly no trial, and no necessity for a trial within the meaning of Article 72.

In my opinion the Public Safety (Powers of Arrest and Detention) Temporary Act, 1924, is intra vires the Constitution, and the application for a writ of habeas corpus must be refused.

DODD J.:—

The case of the applicant has been presented with great fulness by the eminent advocates, Mr. Comyn and Mr. Gavan Duffy. The argument shows a wide study of constitutional law and decisions and dicta of distinguished judges and text writers. While I concur in the judgment of the Lord Chief

(1) [1910] 2 I.R. 695. (2) [1917] A.C. 260, per Lord Finlay, p. 270; Lord Atkinson, p. 272; and Lord Wrenbury, p. 308.

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Justice, I think it becoming that I should briefly deal with the contentions pressed upon us with so much subtlety and erudition. The courtesy of the advocates to the Court was conspicuous, and they are entitled to a like courtesy from me.

I do not need to go through every case cited, for there are one or two propositions within which the entire argument can be confined.

It is essential when a statement is made by a Judge in a particular case to ascertain in what connexion the statement was made, and it is specially necessary to consider how the case came into Court. The arguments of counsel are of importance in finding out what is covered by any decision.

Mr. Comyn relies strenuously on the decision of the Privy Council in Sir John Gordon, *Sprigg* v. *Sigcau* (1). It was argued before the Supreme Court of the Cape of Good Hope that a proclamation dated 11th June, 1895, had, by virtue of the Pondoland Act, 1894, sect. 2, the force of a law, and that Sigcau, being in custody under that proclamation, was lawfully imprisoned. The Court, however, was of opinion that there was no lawful authority for his detention. Mr. Asquith and Mr. Bray contended that the Governor had no power to pass such a law. Such a power cannot come from the Royal prerogative. It must come if at all from the Cape legislature. Then comes this sentence:—"It is admitted that the legislature (i.e. the Cape legislature) might pass an Act, but that had not been done by the Pondoland Annexation Act." On the other hand, Cozens Hardy relied upon a proviso to the Pondoland Annexation Act, by which the Cape Parliament reserved to itself the right to judge of the validity of any legislative act done by the Governor. The proclamation had been laid before it, and had not been repealed, altered, or varied by it. It was therefore effectual for its purpose, and there was no jurisdiction in the Cape Supreme Court to set it aside. But that argument did not prevail either with the Supreme Court of the Cape of Good Hope or with the Privy Council. And that is the argument addressed to us here both by Mr. Comyn and by Mr. Gavan Duffy. The Governor's proclamation was at variance with the existing laws of Pondoland. The Governor purported to do what the Stuart Kings could not do. Upon which one or two observations seem apt. It was conceded that the Parliament could have validly dealt by legislation with what the Governor could not do by proclamation.

Mr. Comyn's protest against my examining the Act establishing the legislative authority in the Cape of Good Hope, as not having been before the Privy Council, falls to the ground; and an examination of that Act shows how far the Governor had usurped authority. I may add further that in its true interpretation that case is against him. The Parliament in this country has exercised a power identical in terms with the powers

(1) [1897] A. C. 238.

conferred not on the Governor of Pondoland, but on the colonial legislature for the peace, order, and good government of the colony. It follows that an enactment similar to the one made by the Saorstat Éireann here, if made by the Cape Government, would have been good. With the rest of Mr. Comyn's interesting account of the history of constitutional law, there is nothing to quarrel; one can but admire the industry and research that went to the elaboration of his argument. There is another chapter, however, in the history of constitutional law with which I shall have to deal later on.

Mr. Gavan Duffy urged that the liberty of the subject was more strenuously put in the forefront of the Free State Constitution than in the Act conferring legislative authority in any other part of the King's dominions, and that should be assumed to have been done, because powers not authorized by law were put in force against those engaged in drafting that historic document. I wish to acknowledge the inference to be drawn. The interpretation, however, must depend on the words of the Act and not on the hopes of its framers. What was supposed to herald an era of settled government turned out to be the harbinger of unrest and rebellion.

And here it is that what I have called the second chapter becomes of importance. It might be more fit to call it a second strand in the Constitution. Mr. Duffy read from *The King* v. *Halliday* (1) the ringing sentences of the dissentient law lord, Lord Shaw, but added that the sentences he quoted were not in conflict with the speeches of the other lords. Nor were they in one sense. But the speeches of the other Peers are in direct conflict with Mr. Duffy's argument before us. There were five Peers taking part in the case. Lord Finlay, at p. 270, says:—"The suggested rule as to construing penal statutes and the provision as to the trial of British subjects by jury made by the Defence of the Realm Act, 1915, have no relevance in dealing with an executive measure by way of preventing a public danger." Lord Dunedin's judgment covers like ground. But Lord Atkinson puts in clear language the two strands of constitutional law. My Lord has quoted from this speech. As it fits in with my judgment, I, at the risk of repetition, refer to some sentences in it. "The question for decision in this case," says Lord Atkinson, "is what the Legislature has done by this statute of November, 1914, not what it did by legislation passed centuries before that date. It may be that so dear to the Legislature of those days was the personal liberty of the subject that it sacrificed, or endangered, the interests of the State and hampered the nation in its struggle for victory in order to preserve that liberty . . . Or it may have been that the circumstances of the time did not need such drastic remedies as do those of the present time."

He goes on: "It was also urged that the regulations deprived

(1) [1917] A.C. 261.

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the subject of his rights under the several Habeas Corpus Acts. That is an entire misconception. The subject retains every right which those statutes confer upon him . . . . If the Legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if intra vires, do not infringe upon the Habeas Corpus Acts in any way whatever or take away the rights conferred by Magna Charta, for the simple reason that the Act and these orders become part of the law of the land. If it were otherwise then every statute and every intra vires rule or by-law having the force of law creating a new offence for which imprisonment could be inflicted would amount, pro tanto, to a repeal of the Habeas Corpus Acts or of Magna Charta."

I will not pursue this further. In a land of settled government the liberty of the subject is the prevailing note. In a land unsettled and turbulent, the duty of the Legislature is to continue as far as may be to reconcile personal liberty with safety to the persons and property of the citizens.

It is counted for unrighteousness against the Legislature that provision is made by which a person interned as here can appeal to an outside authority, and Mr. Gavan Duffy has cited a number of authorities to support an argument that somebody is acting judicially. The answer to that is simple. Whether an officer to whom the duty is given to put the Act in force has something of a judicial character is of no importance. The Legislature has given it to him. But the one complete answer to all the cases referred to is that they are not in pari materia. They are conversant with the power of the Court to grant certiorari or otherwise to review the proceedings of an inferior tribunal. If an officer of the Local Government Board has something of a judicial character in a duty cast upon him by law, this Court can review his finding. If his duty is solely ministerial it cannot. But it cannot be suggested that certiorari would lie here or that Dáil Éireann is an inferior tribunal. This applies to the three heads under which Mr. Duffy grouped his references and authorities. I must content myself by saying I accept them all as sound law, but they are not in my opinion relevant to the present inquiry.

I have dealt as fully as I think necessary with the nice questions opened with such legal subtlety by the counsel for the applicant. But the plain common sense of the matter is free from such subtlety. The Court of Appeal has judicially decided that martial law came to an end in August, 1923. The ground of that decision implies that there is a competent authority to provide for the peace and safety of the land. Where is that authority? Not in the King. Not in the Imperial Parliament. That authority has been transferred to a legislative authority of the people of Ireland per leges terrae, that

is the laws of Ireland. That such authority is conferred is abundantly supported by the decision of the Privy Council in the Canadian cases cited. With the policy of the Act this Court has no concern. It is for the Oireachtas. It is permissible to express regret that it has been deemed necessary as emergency legislation; and to indulge in what was referred to as a pious hope that it may not be necessary to re-enact another Act when this one expires at the end of the year. But it is in the Parliament of the nation and not here that the Executive must answer for the administration of the powers conferred upon it by Parliament.

It is part of the duty of this Court to keep subordinate tribunals strictly within the powers conferred upon them by Parliament. We must be careful not to overstep our own.

The history of the long struggle in England between the Houses and the King so graphically delineated by Mr. Comyn in which one King lost his head, another his kingdom, establishes that the King by his prerogative could not override or suspend an Act of the King, Lords, and Commons of the Realm. We can interpret an Act; we cannot make one.

PIM J.:—

I concur, and only desire to add a few words.

No Act was passed by the Imperial Parliament under which powers were delegated to the Irish Free State. Any limitation on the powers of the Oireachtas must therefore be found in the Treaty or in the Constitution. Both were ratified by the Parliament of Great Britain. It is true that by sect. 4 of the Irish Free State Constitution Act, 1922 (13 Geo. 5, Sess. 2, c. 1), power was reserved to the Parliament of Great Britain to legislate for the Free State, but this power is expressly limited to such legislation as could be passed affecting any other of the self-governing Dominions. To make laws affecting the internal or domestic concerns of any of the self-governing Dominions has long been held to be contrary to constitutional practice, except where rights claimed by a Dominion affect the rights of provincial legislatures within such Dominion. In such circumstances the Imperial Parliament does legislate, but only on the request of the Dominion and of constituent provinces. Such power of legislation does not touch the Free State. It follows from this that there are practically no limitations on the power of the Oireachtas, except such as it has imposed on itself. The Treaty gave the Irish Free State the right to make laws for the peace, order, and good government of Ireland, and for that purpose the Act of the Legislature now impugned as violating the Constitution, was passed. We have been referred to Articles 6 and 70 of the Constitution as being the two Articles by said Act violated. The argument, which was at times somewhat

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difficult to follow, seemed to be based on the assumption that the words "in accordance with law" meant "in accordance with the normal and constant law." Such an argument, if sound, would have the effect of preventing the Free State Legislature from ever strengthening the criminal law dealing with the liberty of the person—that is, it would prevent it from legislating for the peace, order, and good government of Ireland in a very essential particular. This would be a strange interpretation of the Article.

It would be possible, I think, to argue successfully that a permanent law giving the Executive power to deprive any citizen of his liberty without trial was contrary to the spirit of Article 6, and therefore a violation of the Constitution; but that is a very different thing from a temporary law made in abnormal times and for a temporary purpose.

Lord Haldane's judgment in the case of the *Board of Commerce Act,* 1919, *and Combines and Fair Prices Act,* 1919 (1), on appeal to the Privy Council from the Supreme Court of Canada expressly recognized the right of a Dominion Legislature, even in time of peace, where the interest of the State is of permanent and overriding importance, to do, by a temporary Act, what would be unconstitutional if the Legislature attempted to make it permanent. In this particular case it has not been, and cannot be, denied that, apart from the meaning sought to be put on Article 6 of the Constitution, the Oireachtas was within its powers in enacting sects. 4, 5, and 6 of the Public Safety Act, 1924 (I.F.S., No. 1 of 1924). I do not think the power was taken from it by Article 6, and I therefore am of opinion that the prosecutor has been detained in accordance with the law.

The case made under Article 70 is of a different kind. The Article reads:—"No one shall be tried save in due course of law, and extraordinary Courts shall not be established." The prosecutor, who was interned before the passing of the Public Safety Act of 1924, was detained by order of the then Minister of Defence under sect. 4 of that Act. There was no trial or pretence of a trial of the detained person. It is suggested, however, that, in signing the order for the detention the minister was acting judicially, and that therefore the prosecutor has not been tried in due course of law but by an extraordinary Court which had been established contrary to Article 70. It seemed to me that the proposition had only to be stated to be at once rejected; but Mr. Gavan Duffy argued the question with such a wealth of learning that I must deal with it. The assumption which underlay all his arguments was, it seems to me, that if a person in authority be bound to act "judicially" in the exercise of his authority, he, for the purpose of such exercise, becomes a Court. Mr. Duffy cited the case of *The King* v. *The Police Superintendent of Chiswick Station, ex*

(1) [1922] 1 A. C. 191.

parte Sucksteder (1), and quoted the words of Lord Justice Scrutton (on page 591), where he said that the powers of a Secretary of State in making an order for the arrest and detention of an alien were of a judicial character and could not be delegated. No one would be more surprised than the learned Lord Justice if he were told that in using these words he had decided that a Secretary of State, when he made the order, was a Court. The difficulty arises from the poverty of language. Many men at some period or other of their respective lives are required to act "judicially," but that only means that the act must be based on their personal judgment and not on the judgment of some other person. To infer from this that they in each case constituted a Court would lead to extraordinary results.

I am satisfied that the Minister of Defence when he made the order was not a Court; that there was no trial of the prosecutor, and that therefore Article 70 does not apply, and was not violated.

For these reasons I think the writ should be refused.

Solicitor for the prosecutor: *D. J. Browne.*
Solicitor for the respondents: *Chief State Solicitor.*

H. H.

(1) [1918] 1 K. B. 578.

In the Matter of MOSES ORR, a Bankrupt (1).

Bankruptcy—Crown debt—Income tax—Priority—Preferential payments in —Bankruptcy (Ir.) Act, 1889 (52 & 53 *Vict. c.* 60).

K. B. Div.
(N. I.)
(Bank.)
Wilson J.
1924.

Jan. 25.
May 2.

O. was adjudicated a bankrupt in March, 1923, and in the course of the bankruptcy the Commissioners of Inland Revenue claimed £25 15s. 4d. due to them by the bankrupt for income tax. The Registrar in Bankruptcy admitted the Commissioners as preferential creditors for the sum of £13 15s. 8d., being the largest of the three years' assessments due to them, namely, for the year 1921–22, and as unsecured creditors for the balance, £11 19s. 8d., ranking with the other creditors. Upon motion to review the ruling of the Registrar as to the balance:

Held by Wilson J., that the Crown debt for balance of income tax was entitled to priority over the general creditors of the bankrupt.

In re Galvin, a Bankrupt ([1897] 1 I.R. 520), followed.

Motion to review the ruling of the Registrar in Bankruptcy refusing priority in payment for the balance of income tax due to the Commissioners of Inland Revenue after one year's assessment had been paid.

The bankrupt was adjudicated in the month of March, 1923. In the course of the bankruptcy the Commissioners of Inland Revenue made a claim in respect of the sum of £25 15s. 4d. due to them for income tax. The Registrar in Bankruptcy admitted them as preferential creditors for the sum of £13 15s. 8d., being the largest of the three years' assessments due to them, namely, for the year 1921–22, and as unsecured creditors for the balance, £11 19s. 8d., ranking with the other creditors.

J. C. Davison, for the Commissioners of Inland Revenue:—

The Commissioners are entitled to be admitted as creditors for the balance after payment of the preferential payments provided for by the Preferential Payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict. c. 60), in priority to the ordinary debts of the bankrupt. Section 4, sub-s. 1 (*a*), of this Act only deals with a specified portion of income tax, and any balance not falling within that section still retains its original priority as a Crown debt. The effect of the Act is to lift preferential debts above all the debts of the ordinary creditors. We rely on *In re Galvin* (2). There is no section in the Preferential Payments in Bankruptcy (Ireland) Act, 1889, corresponding to sect. 33, sub-s. 7, of the English Bankruptcy Act, 1914, which enacts that "subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid pari passu." The prerogative of the Crown cannot be affected by implication.

[He also referred to *Food Controller* v. *Cork* (3).]

Robb K.C., for the assignees:—

The Crown's priority in regard to income tax is exhausted after one year. *In re Galvin* (2) does not govern the present

(1) In the King's Bench Division (Bankruptcy) (N.I.), before Wilson J.
(2) [1897] 1 I. R. 520.
(3) [1923] A. C. 647.

case. It does not deal with the balance of a Crown debt. It has always been held that the distribution of the balance should be equal. There is an express provision that the Crown's priority shall not exceed one year's income tax, and this exhausts the rights of the Crown: expressio unius exclusio alterius. This is all the priority the Crown is now entitled to in respect of income tax.

Cur. adv. vult.

May 2.

WILSON J.:—

This motion raises the question whether in bankruptcy Crown debts take priority over ordinary debts. It was provided by sect. 4, sub-s. 1, of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, that "in the distribution of the property of any bankrupt, notwithstanding anything in sect. 49 of the Bankruptcy (Ireland) Amendment Act, 1872, or sect. 249 of the Irish Bankrupt and Insolvent Act, 1857, and in the distribution of the assets of any company being wound up under the Companies Act, 1862, and the Acts amending the same, there shall be paid in priority to all other debts (*a*), inter alia, "all property or income tax assessed on the bankrupt or the company up to the 5th day of April next before the date of the order of adjudication, or the commencement of the winding up, as the case may be, and not exceeding in the whole one year's assessment." The question now is what is the position of the balance of Crown debts. In England such balance is not entitled to any priority, because sect. 33 of the English Bankruptcy Act, 1914, uses the word "debts" in a sense which includes Crown debts; and provides that, subject to the priority as to rates, wages, and similar matters thereby given, all debts shall be paid pari passu. No similar section exists in Ireland. The matter was discussed in the late Court of Appeal in Ireland in *In re Galvin, a Bankrupt* (1). The judgment of the Lord Chief Baron shows clearly that the provisions of the Bankruptcy Acts giving priority to particular Crown debts do not affect the priority of the Crown for other debts. In this country the original priority continued to exist, as it had never been taken away. The result is certainly most anomalous, as it means that where in Ireland a man is made a bankrupt, the whole balance of Crown debts due can be recovered, although in England the Crown would only be entitled to one year's debts, and afterwards to a dividend along with the other creditors. This is a ridiculous state of the law, but I am bound by it.

Accordingly I hold that the Commissioners of Inland Revenue are entitled to priority over the ordinary creditors, and must be paid. In the circumstances I declare all parties entitled to their costs out of the estate.

Solicitor for the Commissioners of Inland Revenue: *J. H. B. Gunning.*

Solicitors for the assignees: *Wheeler & M'Cutcheon.*

J. M'C.

(1) [1897] 1 I. R. 520.

H. L.
1924.
May 6.

[HOUSE OF LORDS.]

IN RE WARD, INFANTS. BRIGID WARD, APPELLANT *v.* ALEXANDER LAVERTY AND MARGARET LAVERTY, RESPONDENTS (1).

Infant — Custody — Habeas corpus — Religious education — Dead father's express direction — Welfare of child — Change of religious education — Separation of family.

In 1911 M. and E. were married according to the rites of the Roman Catholic Church. E. had been a Presbyterian, but shortly before her marriage became a Roman Catholic. There were three children of the marriage, daughters. In 1920 M. fell into habits of intemperance, and ceased to provide a home for E. and his children. Accordingly E. brought the children with her to her father's house, who thereafter supported them all; and M. went to live with his brother. At the same time the eldest girl was taken from a Roman Catholic school and was sent to a Presbyterian school, which she continued to attend for nearly two years. In July, 1920, M. made his will, whereby he directed that the children should be brought up in the Roman Catholic faith. After her husband's death, in October, 1920, his widow became once more a Presbyterian, and died in March, 1923, a member of that Church. The children, from the date of their mother's death, continued to reside with their maternal grandfather and grandmother, who brought them up as Presbyterians. The children were respectively aged eleven, six, and four years at the time of an application for a writ of habeas corpus, which was made to the King's Bench Division, Northern Ireland. The Judges (Sir Denis Henry C.J. and Brown J.) having interviewed the eldest girl, were satisfied that she had acquired fixed Presbyterian convictions, held that it would not be for her benefit to hand her over to her paternal relatives, but adjudged that in the case of the two younger children the express directions of their father should be followed. The Court of Appeal (Moore and Andrews L.JJ.) affirmed the judgment of the King's Bench Division in relation to the eldest girl, but allowed an appeal in the case of the two younger children, on the ground that it was for the welfare of all the children that they should be brought up together in the custody of their maternal relatives.

The House of Lords affirmed the decision of the Court of Appeal.

On the question of the religion in which a young child is to be brought up, it is the welfare of the child which forms the paramount consideration. The wishes of the father are to be considered, and, if there is no other matter to be taken into account, then the wishes of the father prevail. If a sufficient case is made for going contrary to the father's wishes, then the Courts have no hesitation in doing so.

M'Gonigal K.C., T. J. Campbell, and *P. M'Corry* (all of the Irish Bar), for the appellant.

Babington K.C., Murphy, K.C., and *William Lowry* (all of the Irish Bar), for the respondents.

(1) In the House of Lords, before VISCOUNT CAVE, VISCOUNT FINLAY, and LORDS ATKINSON and SUMNER

At the conclusion of the argument on behalf of the appellant, counsel for the respondents being present, but not being called upon, their Lordships delivered judgment as follows:—

VISCOUNT CAVE*:—

My Lords, this is an appeal from an order of the Court of Appeal in Northern Ireland partly affirming and partly reversing an order made by a Divisional Court of the King's Bench Division (1).

The order under appeal relates to the three orphan daughters of the late Matthew Joseph Ward and Elizabeth, his wife, the daughters being Mary, who is now 12¼, Lila, who is now aged 7, and Peggy, who will be 5 at the end of this month. These children are now, and have for some time been, in the care of their maternal grandparents, Mr. and Mrs. Laverty, the respondents to this appeal. The grandparents are Presbyterians, and the children are being or will be brought up as Presbyterians. The order under appeal was made upon an application of Miss Brigid Ward, an aunt of the children's father, and therefore a grand-aunt of the children, for the issue of a writ of habeas corpus with a view to the children being placed in the custody of their paternal relatives, who are Roman Catholics, and being brought up in the Roman Catholic faith. The Divisional Court refused a rule as regards the eldest child, Mary, but granted it as regards the two younger children; and, cross-appeals having been lodged, the Court of Appeal affirmed the decision as regards Mary, but as regards the younger children, reversed the decision of the Divisional Court and refused a rule. Hence the present appeal.

My Lords, the facts, when the affidavits are carefully looked into, are not seriously in dispute. Matthew Joseph Ward, who was a Roman Catholic, was married on the 22nd February, 1911, to Elizabeth Laverty, a daughter of the respondents, who, as I have said, are Presbyterians. Elizabeth Laverty, the wife, had until that time been a Protestant, but just before, and probably with a view to the marriage, she was received into the Roman Catholic Church. The couple lived in Belfast, and these three children were born to them—one in January, 1912, one in April, 1917, and the third in May, 1919. The daughter Mary, when she was old enough, attended a Roman Catholic school in Belfast, and at the age of seven years or thereabouts made her first Communion in accordance with the practice of the Roman Catholic Church. The other two children were quite young until the date when their father died, one being then only three years old and the other one year old; and, of course, no question of religion had arisen as to those two young children.

* The report of the judgments in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Sons.

(1) Ante, p. 19.

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The marriage was not a happy one, and certainly it was not a fortunate one for the wife. The husband constantly drank to excess, and in April, 1912, three months after the birth of the first child, was discharged for intemperance from his employment. After that time the habit of intemperance continued, and he was constantly drunk; he was also cruel and violent to his wife, and on one occasion (in the year 1915) he was convicted of an assault upon his wife and of habitual drunkenness. He failed to support his wife and children properly, so that the wife had to keep herself and her children; and at times (as I gather from the affidavits) her husband also, by what she could earn at dressmaking. On several occasions she was forced to leave her husband, and with her children to take refuge with her parents, the respondents, who apparently were always ready to receive and to succour her. In the month of June, 1920, the final rupture occurred. At that date the wife left her husband, with the children, and went to live with her parents. The husband went to live with his brother at a place called Gargory, about thirty miles from Belfast, and from that time until his death he neither supported his family nor, so far as the evidence shows, took any interest in them at all. The husband, the father of the children, died somewhat suddenly on the 27th October, 1920. He left a Will, which has been proved, by which he gave his freehold property to be sold and the proceeds to be distributed among the children equally, and he desired his wife to be trustee of the proceeds; and he added: "I also wish and desire that those three children be brought up in the Roman Catholic faith, in which they were baptized, and of which they are at present members." It is said that the value of the property is about £2,000.

My Lords, I now turn to the history of these children since the separation of their parents in June, 1920. It would appear that at, or soon after, that time the mother of the children ceased to conform to the Roman Catholic faith; for it is proved that, immediately after leaving her husband, she took the child Mary away from the Roman Catholic school which she had attended and caused her to attend a National school connected with the Baptist denomination. Mary would then be about 8½ years old, and she continued to attend that school until the commencement of these proceedings. It is suggested in one affidavit that the father approved of her being sent to that school; I doubt whether that is established, and I think the more probable view of the evidence is that he neither inquired nor cared how or where the child was receiving her education. At about the same time, or soon afterwards, Mary began to attend the Presbyterian Church, St. Enoch's Church, with her grand-parents and their family, for in addition to the grand-parents there were two unmarried daughters living with them; and I have no doubt, on a fair reading of the evidence, that the wife, Mrs. Ward, also attended that church. At all events it

is proved that before her death she reverted to her former faith, became again Presbyterian, and died in that communion. The Rev. John Pollock, who is the minister of St. Enoch's Church, said in evidence that the little girl, Mary, came regularly to the church with her grandfather, that he conversed with her on religious matters once or twice, and that his opinion was that she had decided convictions in favour of the church she was attending. He based that opinion on what he knew of her mind in the matter.

During this period, that is to say from June, 1920, to the date of the mother's death in March, 1923, it is not proven that any member of the father's family took sufficient interest in the children to find out in what religion they were being brought up or where the eldest girl went to school. There is some vague evidence that they endeavoured to see the children, and that from time to time the mother of the children visited the grand-aunts, but there is nothing to show that the grand-aunt who applies, Brigid Ward, or her sister, Mrs. Jordan, who makes an affidavit, made any real attempt to find out how the children were being brought up.

My Lords, the mother of the children, Mrs. Ward, died on the 23rd March, 1923, and thereupon their paternal relatives began to make some inquiries, and in April, 1923, they took these proceedings, with the result which I have stated. To make the story complete I should add that it is not disputed that the children are happy in their present home, and that the grand-parents are fond of them—their conduct during the last twelve years is sufficient evidence of that—and the grand-parents say that they are ready and willing to care for the welfare and happiness of the children if they are left with them. On the other hand, the paternal relatives, who have shown little interest in the children in the past, do not now in their evidence profess any affection for them—probably they are little known to the children—and the only reason for the application given in the affidavit of the appellant is that the paternal relatives desire that they should be brought up in the religion of their father. For that reason, they say, they are willing to take the custody of the children and to keep them at their place, which is an upper floor above some licensed premises, where the two grand-aunts, Mrs. Jordan and Miss Ward, reside; and there is some suggestion that the children may be sent to a school or institution connected with the Roman Catholic religion. There is further the important fact that the learned Judges of the King's Bench Division saw the eldest child, Mary, as they were, of course, quite entitled to do; and the Lord Chief Justice gives his account of the interview. He says (on page 32 of the Appendix): "We saw the child ourselves. She is a bright, intelligent child, between 11 and 12, and the opinion we have formed of her coincides with that of the reverend gentleman," that is to say, the

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Reverend Mr. Pollock, who had stated that she had decided convictions in favour of the Presbyterian Church. That statement about her convictions is confirmed by the evidence of the grand-parents.

Now, my Lords, upon these facts the question is what ought to be done as regards these children? The law in these cases is well settled, and, indeed, is not contested by the learned counsel who argued the case before this House. On the question of the religion in which a young child is to be brought up, the wishes of the father of the child are to be considered; and, if there is no other matter to be taken into account, then, according to the practice of our Courts, the wishes of the father prevail. But that rule is subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare of the children themselves. It is the welfare of the children which, according to rules which are now well accepted, forms the paramount consideration in these cases. Some of the earlier judgments contain sentences in which perhaps greater stress is laid upon the father's wishes than would be placed upon them now; but in the more recent decisions, and especially since the passing of the Guardianship of Infants Act, 1886, sect. 5 of which Act shows the modern feeling in these matters, the greater stress is laid upon the welfare and happiness of the children. It is, of course, still true, as the learned counsel who argued the case quite properly said, that a sufficient case must be made for going contrary to the father's wishes; but if such a case is made then the Courts have no hesitation in deciding upon the whole facts of the case.

Now, my Lords, looking at the matter in that light, what is the true conclusion in this case? I take first the daughter Mary. She is a child of 12, bright and intelligent; and the evidence and the statement of the learned Judges of the King's Bench Division show that she is interested in religious matters, and has decided convictions in favour of the Presbyterian Church. For nearly four years she has attended a Protestant school, and for the greater part of that time she has attended a Protestant church. No doubt she is still young, but the growth in character and in conviction during the years from 8 to 12 is infinitely swifter and of more importance than it would it would be in the tender years up to the age of 8; and, in view of what the learned Judges have said, I think your Lordships will have no difficulty in accepting the view that this child has acquired settled, or, at all events, strong convictions in favour of the Protestant faith and of the Presbyterian Church which she is attending.

If that is so, to force a change of religion upon this young child now would be a serious matter. It might, as a distinguished Judge said in the case of *Stourton* v. *Stourton* (1),

(1) 8 De G. M. & G. 760.

which has been cited, have the result that, assuming tares to have been sown, the wheat would be pulled up with the tares, that is, it might wholly confuse her religious beliefs, and the ultimate effect might be that she would cease to have any religious convictions at all. There is a danger, as Lord Lindley said in the case of *In re M'Grath* (1), in allowing relatives on one side or the other to play battledore and shuttlecock with the religious training of a child of that age. Where a conviction in favour of a particular faith is found to exist, then I think any Court would hesitate long before permitting it to be subjected to that risk.

My Lords, there is also the question of the welfare and the future happiness of the child in other respects. As to the question of means, there is, as the learned Judges have said, not much to choose between the relatives on the one side or the other. But there are these facts, that the child knows and is fond of her grand-parents, with whom she has lived now for some years; that she relies, and is justified in relying, upon their tried affection; and that if she were moved to a new home where she would be among strangers, she might become unhappy, and she would not be in a position, as she is now, to take her troubles to those whom she knows and for whom she has conceived affection.

Against these considerations, my Lords, there are to be set the wishes of the child's father. I do not think the evidence is sufficient to show, in the words of some of the cases, that he abandoned his right to be heard upon the matter. I think that his wishes must still be considered, and that he has expressed them, not only in his Will, but in the fact that throughout his life these children were brought up as Roman Catholics. At the same time, I do not think it is right to put entirely out of account the character of the father, the way in which he himself behaved, and especially the way in which he treated his wife, and the fact that he failed to support both his wife and his children. The wishes of such a father are not entitled to the same weight as those of one who has been called in the cases "a good and honest father." There is also the fact that some months before his death he permitted the home to be broken up and the children to be taken to a Protestant home, and, at all events, made no attempt to inquire in what faith the children were, from that time, being brought up. It is also to be remembered that for nearly three years after his death, namely, from October, 1920, to March, 1923, his relatives appear to have taken no steps either to find out in what religion the children were being brought up, or to ensure that they should be brought up in the faith of their father. If the considerations on both sides are weighed, I think there can be no doubt that it will be for the welfare of the daughter Mary, that so far as she is concerned things

(1) [1893] 1 Ch. 143.

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should be left as they are, and that it would be most injurious to her welfare to take her away now from the custody of her grand-parents, or to remove her from a Protestant to a Roman Catholic household. With regard to Mary, therefore, I entertain no doubt at all that the decision of the Court of Appeal was right, and should be affirmed.

As regards the two younger children, Lila and Peggy, the case, of course, is different. As regards these children, no question of religious convictions arises; they are far too young to have formed any such convictions. But the decision of the Court of Appeal proceeds upon this, that it would be wrong to separate them from their elder sister and to deprive them, not only of the care of their grand-parents, but of the care which an elder sister, even at the age of 12, can give to her little sisters, and also that, from a spiritual point of view, it would be wrong in this case to create a division in religion between these members of one family, to have the eldest child brought up as a Protestant and the two younger ones brought up as Roman Catholics. My Lords, that point was mentioned, but, so far as the judgment shows, was not very much considered by the learned Judges of the King's Bench Division. It was fully considered by the Court of Appeal, and they came to the conclusion that, for the reasons which I have stated briefly, but which are stated at much greater length in their judgment, it would not be for the welfare of the younger children to remove them from the care of their grand-parents and to remove them to the care of their paternal grand-aunts. I have again carefully considered the matter, and I find myself, on this point also, in agreement with the Court of Appeal. It is admitted quite frankly that, if the children remain where they are, they will be brought up Protestants; but the applicants have disclaimed any desire to have direction given as to the religion in which the children shall be brought up, apart from the question of custody. They ask for custody, and not for any special order as to the religious faith. That being so, one must consider the question as a whole. I do not think it would be for the good of these little girls that they should be separated in residence from their elder sister, that they should lose her companionship and care, or that in their future life they should be divided from her by what has been referred to as "the chasm of different religious opinions"; nor do I think that it is good for them that they should now be deprived of the affectionate care of their grand-parents and the other members of the household in which they are now living.

These considerations, which relate to the welfare of the younger children, appear to me to prevail over the wishes of the father, especially such a father as this; and accordingly I have come to the conclusion that, in this case also, the decision of the Court of Appeal is the right one. I move that this appeal be dismissed with costs.

VISCOUNT FINLAY :—

My Lords, I have arrived at the same conclusion, and for precisely the same reasons as those which have been just stated from the Woolsack.

LORD ATKINSON :—

My Lords, I concur, and for the same reasons.

LORD SUMNER : My Lords, I agree.

Questions put.

That the order appealed from be reversed.

The Not Contents have it.

That the order appealed from be affirmed, and this appeal dismissed with costs.

The Contents have it.

Solicitors for the appellants : *John B & F. Purchase & Clark,* for *Daniel O'Rorke & Son,* Belfast.

Solicitors for the respondents : *Barlow, Lyde, & Yates,* for *C. & H. Jefferson,* Belfast.

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1924.
May 1.

[HOUSE OF LORDS.]

LONDON AND LANCASHIRE INSURANCE CO., LIMITED, APPELLANTS; BOLANDS, LIMITED, RESPONDENTS (1).

Insurance policy—Loss by burglary, housebreaking, and theft—Exceptions—Riot—Theft committed in circumstances amounting to riot.

A policy of insurance effected by the respondents with the appellants against loss by burglary, housebreaking, and theft provided that "this insurance does not cover loss directly or indirectly caused by, happening through, or in consequence of (inter alia) riots." A loss having been incurred by the respondents by a theft, the circumstances of which amounted to riot, the parties went to arbitration as to their rights under the policy. The arbitrators found that the loss was caused by or happened through or in consequence of a riot within the meaning of the policy, and that the claimants were not entitled to recover. In a special case stated for the opinion of the King's Bench Division the arbitrators set out the circumstances in which the loss occurred, and submitted for the opinion of the Court the question whether on the facts they were entitled so to find. The King's Bench Division answered this question in the negative, and this decision was affirmed successively by the High Court of Appeal in Southern Ireland and the High Court of Appeal for Ireland.

The House of Lords, reversing the High Court of Appeal for Ireland, *held* that, inasmuch as the circumstances in which the theft occurred themselves amounted to riot, the resulting loss was within the exception in the policy, and that the arbitrators were justified in their conclusion.

S. L. Brown K.C. (of the Irish Bar), *Samuelson* (of the English Bar), and *Murnaghan* (of the Irish Bar), for the appellants.

FitzGibbon K.C. and *Marnan* (both of the Irish Bar), for the respondents.

VISCOUNT FINLAY (2):—

My Lords, this is a case stated by the arbitrators for the opinion of the Courts, and it now comes before your Lordships by way of appeal; it relates to a policy "against loss by burglary, housebreaking, and theft of the cash" mentioned in the policy, being "£5,000 in cash in the cashier's office of the assured's bakery, known as 'The City of Dublin Bakery'"; and then follows a proviso: "Provided that this insurance does not cover loss directly or indirectly caused by, happening through, or in consequence of (*a*) invasion, hostilities, acts of foreign enemy, riots, strikes, civil commotions, rebellions, insurrections, military or usurped power or martial law, or the burning of property by

(1) In the House of Lords, before VISCOUNT FINLAY, and LORDS ATKINSON, SUMNER, BLANESBURGH, and DARLING.

(2) The report of the judgments in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Sons.

order of any public authority; (*b*) incendiarism directly or indirectly connected with any of the circumstances or causes above mentioned in (*a*)."

My Lords, the circumstances in which this loss occurred are compendiously stated in the case, and will be found at p. 5 of the appendix. The arbitrators set out the terms of the policy in the case, and then, in paragraph 3, they state at some length the circumstances in which the loss occurred; they say that the watchman of the premises heard a knock at the side door; he opened it; "four men entered (none of them disguised), pushed in the watchman, and ordered him to go down the yard. Then they searched him, and one of them directed him to put up his hands, and kept him in that position until the robbers left. The others rushed into the office, shouted 'Hands up,' covering all who were present with revolvers," and then the names of the persons present were given, some half a dozen of them. "They asked" (that is, the men who had entered asked) "where the telephone was, and cut it. The cashier, seeing a hand presenting a revolver at him from outside his office window, had left the cash office enclosure, but at the door of the outer office was held up by one of the armed men, who ordered him to put up his hands and stand further up the room." Then the money was taken away by one of the men, including certain money which was being counted up. "One of the armed men came to where the cashier had been directed to stand, and asked him to point out the safe, saying, 'have the contents of this (revolver) or give me the keys of the safe.' The cashier pointed out the safe, which was open. It had been locked before the late vanmen, already named, arrived, but had been opened to put away the cash received from them. Two of the robbers went to the safe and took what money they found there, but overlooked the larger bank notes and a quantity of Treasury notes. The robbery occupied about ten minutes, and the employees present were warned not to leave the premises for a quarter of an hour." The men were not disguised, and the cashier thinks he could identify two of them. Now, my Lords, the circumstances, as they are stated, seem to me to constitute what in the legal sense of the term would be a riot. Whether one looks at the acts that were done and threatened, or to the number of persons present, or the whole surroundings, one is forced to the same conclusion, that it would be perfectly impossible to say that all the essentials to the constitution of the offence of a riot at law did not exist. There was a riot beyond all question.

It is said that the exception in the policy for loss by riot does not apply to this case, because the riot was in truth the theft itself under another name. The theft was conducted by a number of persons with considerable violence and threats of greater violence; and it is contended that where a riot is the effecting of the theft itself owing to the manner in which it is carried out, the exception does not apply. For the purposes of answering

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the question that arises on that, one must look at the words of the policy: "Provided that this insurance does not cover loss in consequence of"—I take first the first three heads mentioned—"invasion, hostilities, acts of foreign enemy." These are mentioned for the purpose of excluding all idea of anything done in the way of taking away money by foreign enemies, or in the course of anything that might be described as an invasion, and, in the case of hostilities generally, so as to exclude the idea that this would be a theft within the meaning of the policy. Well, that is perfectly true, and it is also true that these words are introduced for the purpose of excluding thefts which might take place in the confusion incidental to any of the things which are there enumerated under the three heads which I have just referred to—"invasions, hostilities, acts of foreign enemy"—if they are "directly or indirectly caused by, or happen through or in consequence of" any of these things.

Then we come to the head of "riots." I will pass by that for the moment, returning to it when I have run through the other heads. "Strikes."—Strikes are mentioned, I presume, because, unfortunately, strikes are sometimes attended by a good deal of disorder, and it might happen that theft of money took place in the course of some disorders which originated out of a strike. "Civil commotions"—that we are not at liberty to deal with on this case, in my opinion, because the case is stated in a very special manner. The point was taken as stated on p. 8 of the appendix, paragraph 4 of the special case, by the respondents: "The respondents denied liability on the grounds of riot and civil commotion; as to the latter ground, we find that on the evidence the claimants proved sufficiently that the loss did not in any way arise under or through civil commotion, but being of opinion that the facts as set out in paragraph 3 hereof in regard to the circumstances in which the money was stolen constituted a riot within the legal definition of the word, we find"—that is, the arbitrators find—"and award that the loss was caused by or happened through or in consequence of a riot within the meaning of the said policy, and that the claimants are not entitled to recover any sum of money from the respondents in respect of the said loss. The question for the Court is: whether upon the facts herein stated we are justified in so finding." That I take to mean this: the question for the Court is whether in point of law the arbitrators could come to the conclusion which they arrived at as to the effect of the clause so far as "riot" is concerned. I do not read the reference to the Court in the case as extending at all to the question of civil commotion—that the arbitrators dealt with; they saw their way to deciding it right off, and they did not state any case with regard to the effect of the words "civil commotion," and it is quite impossible for us, in the absence of any reference to the Courts as to whether in point of law the finding of the arbitrators could be supported, and in the absence of any power to the Courts and to your Lordships'

House to draw inferences of fact, to say whether in their opinion the arbitrators were right or wrong in the conclusion of fact which they came to with regard to the question of civil commotion; that is entirely beyond the province assigned to your Lordships upon this appeal, on which we have to deal only with the question stated, and that is the question with regard to the word "riot." I have gone into that as my reason for not saying anything further about "civil commotion" as one of the heads in the proviso in the policy. Then it goes on: "Rebellions, insurrections, military or usurped power or martial law, or the burning of property by order of any public authority; (*b*) incendiarism directly or indirectly connected with any of the circumstances or causes above mentioned in (*a*)." I need not go through again the considerations to which I have adverted in dealing with the earlier heads in this paragraph; they equally apply to the heads which I have just referred to in the later part of the paragraph.

My Lords, in these circumstances the question put to the Court, and with which your Lordships have on appeal to deal, is whether upon the facts herein stated the arbitrators were justified in finding "that the loss was caused by or happened through or in consequence of a riot within the meaning of the said policy, and that the claimants are not entitled to recover any sum of money from the respondents in respect of the said loss." My Lords, I certainly am not prepared to find that the arbitrators were not justified in coming to that conclusion; on the contrary, I think that they were right. We have been told that the word "riot" here should not be read in its legal sense. In the course of the argument I myself asked several times, if we were not to take the legal sense, what then was the sense in which the word was to be read? I confess I have not heard any satisfactory answer to this question put by myself and by other members of your Lordships' House who have taken part in the hearing; and, so far from thinking or saying that the arbitrators were wrong, I am bound to say that I think they were perfectly right. I do not see how it can be read satisfactorily in any other way.

Reference has been made to a very pointed passage in the judgment delivered in the case of *Boggan* v. *Motor Union Insurance Co.* (1) by Lord Justice Ronan. I am reading from p. 189 in the second volume of Irish Reports, King's Bench Division, 1922. The Lord Justice says this: "In dealing with this case we must consider whether the robbery occurred during a riot, or whether we must take clause 2 and exception (*c*) together and read clause 2 as 'loss or damage by burglary, housebreaking, or theft, except where such burglary, housebreaking, or theft constitutes a riot in law.' That seems to me to be inconsistent with the policy as a whole. The meaning of the policy seems to be that if, while a riot is in progress, or if

(1) [1922] 2 I. R. 184.

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Viscount Finlay.

there has been a riot, and in consequence of it, a theft takes place, the company is free; but the mere fact that the crime of theft itself contains elements of riot at law does not exclude the right of the insured under the policy. In that case every robbery for which on indictment the accused could technically be convicted also for riot would be outside the policy." I confess I am quite unable to accept the view which the Lord Justice seems to indicate in that passage as being that to which he is inclined. This policy was drawn up at a time when it seems to have been apprehended that there might be disturbances of various kinds in the country in which the cash, the subject of insurance, was situated; and then they provide against the inclusion in the policy of loss by theft occurring during or in consequence of various things, one of them being riot. As I have said, that there was a riot here in the circumstances in which this money was taken, I think it is perfectly impossible to doubt. Force was used, and it is clear that those who were conducting the operation felt that they had force behind them, and that they could control the situation—and that amounted to a riot. Why are we to say that the proviso does not apply? It seems to me that it does. Why should it apply only if the riot is a collateral event, during which the theft takes place, and not apply to a riot one of the objects of which, at all events, was the actual committing of the theft? I cannot so cut down the language of the policy. I read it as applying to the circumstances of the present case, and it seems to me that the only conclusion at which we can satisfactorily arrive is that the arbitrators were right in the view which they took as to the construction of the policy and the facts relating to this robbery.

LORD ATKINSON:—

My Lords, I concur, and I have only a word to add. I think during part of the argument one would have supposed that the words "riot" and "burglary" were mutually inconsistent terms altogether. There is no doubt that a riot may be committed in the course of a burglary, or a burglary may be committed in the course of a riot, or a riot may be indulged in for the very purpose of committing a burglary. Now it would appear to me clear that the loss of this money upon this particular night was either caused directly or indirectly, or happened through or in consequence of what was done by these people on the 25th of June. It would appear to me that the word "riot" has to be taken in its ordinary sense. What they did in bringing about the loss amounted to a riot. The arbitrators have construed the policy, and they have held that the word "riot" where it occurs in it means a riot in the ordinary sense, and they have found that the evidence given before them entirely supports and sustains that conclusion. Indeed, Mr. FitzGibbon himself admitted that the people who were engaged in this attack upon this house could

have been indicted and convicted upon that evidence of a riot, taking the word in its ordinary sense. Therefore, if this appeal is not to succeed, one must conclude that the word "riot," as used in this proviso, has a sense differing from its ordinary sense, because it is admitted by counsel for the respondents that, if it is to be interpreted in its ordinary sense, the finding of the arbitrators cannot be disturbed. Well, during the progress of the argument I think all the different members of your Lordships' House on different occasions have endeavoured to find out what is the sense in which it is to be read if it is not the ordinary sense. What is this kind of diluted sense in which this word is to be read if not the ordinary sense? We have not been shown from either the nature of the document or the context in which the word is used, or from any other reason or source, why it is to receive any but the ordinary meaning. I think it must receive the ordinary meaning. It has received the ordinary meaning at the hands of the arbitrators. I think that their decision was admittedly upheld by the evidence given before them; I think they came to a right conclusion and that their finding cannot be disturbed, and that this appeal must accordingly succeed.

LORD SUMNER:—

My Lords, I agree. What was said in your Lordships' House in the case of *Boggan* (1) by two at least of the noble and learned Lords, apparently with the concurrence of the others present, would in itself present considerable difficulties in the way of anyone who sought to distinguish that case from the present case. I should certainly have hesitated long before setting myself to that task; but, without relying exclusively upon that decision, I think that on a consideration of the words of the contract now in question, the result must be the same, and that the appeal ought to succeed. There has been in this case, quite clearly, a loss by theft of the cash insured and described. Everything, therefore, turns upon the proviso relied upon by the appellants as excluding the loss in question from losses which are covered by the policy. The material words are these: "Provided that this insurance does not cover loss" (that is to say, the loss of the cash described) by theft "directly or indirectly caused by" a riot. Can it be said that this loss was not, directly or indirectly, caused by a riot? I think it cannot. Can it be said that when the learned arbitrators (who were in agreement upon this question) have found and awarded that the loss was caused by a riot upon the facts found and stated to them they were wrong? I answer "No."

My Lords, I do not question, of course, that the contention which has been urged on behalf of the respondents—and, so far as I am concerned, urged in such a way as to incline me, if it were reasonably possible, in their favour—is not one which up to

(1) [1923] 2 I. R. 136.

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a point is borne out by the language of the proviso. That proviso, no doubt, does include cases where the theft is facilitated by an antecedent or a simultaneous occurrence, such as is enumerated here; but it is not enough to say that it includes such cases; it is necessary to show that it is confined to them; and that I see no warrant for doing. It is true that the uninstructed layman probably does not think, in connexion with the word "riot," of such a scene as is described in the case stated. How he would describe it I know not; but he probably thinks of something, if not more picturesque, at any rate more noisy. There is, however, no warrant here for saying that, when the proviso uses a word which is emphatically a term of legal art, it is to be confined, in the interpretation of the policy, to circumstances which are only within popular notions on the subject, but are not within the technical meaning of the word. It clearly must be so with regard to martial law; it clearly, I think, must be so with regard to acts of foreign enemies; and I see no reason why the word "riot" should not include its technical meaning here as clearly as "burglary" and "housebreaking" do.

Furthermore, the incidents out of which this loss occurred comply, in my view, with those very tests which were put forward to us as being essential to constitute a riot within the proviso. In broad daylight a gang of armed men, having obtained entrance into the premises by a trick, cow, if not terrorize, a superior number of persons, rushing into the place and shouting to them to hold up their hands, and threatening them with death if they fail to do so. If the criminals had had more hardihood, and had the courage to fire (which apparently they had not) when a couple of men of considerable nerve resisted them, although unarmed, not only the noise, but the resulting disturbance generally might have extended very far. It appears to me that it was a scene of tumult, and certainly a scene of disturbance of public peace, which to a layman, as well as to a lawyer, might well, on consideration of those aspects of it, be called a riot. So it seems to have struck the learned arbitrators; nor was it contested that, had the case been tried by a jury, there was evidence to go to a jury upon the application of the policy, even in the sense of the word "riot" contended for by the appellants. It is also quite true that some of these enumerated and accepted matters are such as do not directly cause a theft, though they may do so indirectly. That is true, I take it, of strikes and the burning of property by order of a public authority; but it is also true, on the other hand, that direct causes of theft may be found among several of the enumerated matters, that is, not merely in the word "riot," but also in acts of foreign enemies and in acts of usurped power, and, I imagine, also in the words "civil commotion"; and therefore, when you have a clause which is adapted to cover two classes of clauses, one a class which can only operate indirectly and another a class which can operate both directly and indirectly, there is no reason for saying that the word "riot" is

intended only to refer to circumstances which, as it was well put, are the circumstances in which the theft insured against was committed, and are not relative to the nature or quality of the theft itself. I think, therefore, on consideration of the construction, that it must be read against the assured.

It is suggested further that there is some ambiguity about the proviso, and that, under the various well-known authorities, upon the principle of reading words contra proferentes, we ought to construe this proviso, which is in favour of the insurance company, adversely to them. That, however, is a principle which depends upon there being some ambiguity, that is to say, some choice of an expression, by those who are responsible for putting forward the clause, which leaves one unable to decide which of two meanings is the right one. In the present case it is a question only of construction. There may be some difficulty, there may be even some difference of opinion about the construction, but it is a question quite capable of being solved by the ordinary rules of grammar; and it appears to me that there is no ground for saying that there is such an ambiguity as would warrant us in reading the clause otherwise than in accordance with its express terms.

I therefore concur in the motion about to be proposed from the Woolsack.

LORD BLANESBURGH:—

My Lords, during the course of the argument I was personally very strongly predisposed in favour of the view taken of such a proviso as we find in this policy by Lord Justice Ronan in the passage from his judgment in *Boggan* v. *Motor Union Insurance Co.* (1), which has been read by the noble and learned Viscount on the Woolsack. I am constrained, however, albeit somewhat doubtfully, to come to the conclusion that the answer to that view of the proviso has just been stated by the noble and learned Lord who has preceded me, and accordingly, although not without hesitation, I concur in the conclusion in this case which suggests itself as correct to the other members of the House.

LORD DARLING:—

My Lords, I merely desire to say that I agree in the conclusion which has been reached by the noble and learned Lords who have spoken.

(1) [1922] 2 I. R. 184.

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Questions put.

That the order appealed from be reversed.

The Contents have it.

That the question of law submitted in the special case be answered in the affirmative, and that judgment be entered for the appellants.

The Contents have it.

That the respondents do pay to the appellants their costs here and below.

The Contents have it.

Solicitor for the appellants: *W. C. Croker,* for *Hoey and Denning,* Dublin.

Solicitors for respondents: *Dyson, Bell, & Co.,* for *D. & T. Fitzgerald,* Dublin.

THE KING (ARMSTRONG) *v.* COUNTY COURT JUDGE OF WICKLOW (1).

Appeal.
(*I. F. S.*)
1924.
Mar. 24, 25, 31.
April 1, 7.
May 23.

Irish Free State—Courts—Jurisdiction—Workmen's Compensation Act, 1906 (6 & 7 *Ed.* 7, *c.* 58), *sect.* 7—*Seaman injured abroad—British ship—Registered in England—"Same jurisdiction as heretofore"—Irish Free State Constitution Act*, 1922 (13 *Geo.* 5, *c.* 1, *Sess.* 2), *Articles* 73 *and* 75.

Article 73 of the Irish Free State Constitution Act, 1922 (13 Geo. 5, c. 1, Sess. 2), passed by the Imperial Parliament and Dáil Éireann, acting as a Constituent Assembly, enacts that, "subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstat Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same, or any of them, shall have been repealed or amended by enactment of the Oireachtas."

Article 75 enacts that "until Courts have been established for the Irish Free State (Saorstat Éireann) in accordance with the Constitution, the Supreme Court of Judicature, County Courts, Courts of Quarter Sessions, and Courts of Summary Jurisdiction, as at present existing, shall for the time being continue to exercise the same jurisdiction as heretofore."

An accident, in respect of which a claim for compensation was made, occurred to M. B. on 19th May, 1922, in the harbour of Kingston, Jamaica, on board the respondents' ship, which was a British ship, registered of the port of Liverpool. On September 1st, 1923, after the Constitution had come into operation, and before the establishment of new Courts in the Irish Free State, M. B., who resides within the Free State, issued, in the County Court of Wicklow, a request for arbitration under the Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), between him and the respondents, E. & F., Ltd., English shipowners, having their registered office in London.

The respondents applied for a writ of prohibition directed to the County Court Judge of Wicklow, prohibiting him from entertaining the application for compensation on the grounds that there was no jurisdiction in the County Court Judge of Wicklow to hear or entertain the arbitration proceedings, and that the proceedings had been wrongly instituted there, inasmuch as the subject-matter thereof was without the jurisdiction of the Free State.

Held (O'Connor M.R. dubitante), affirming the King's Bench Divisional Court (Molony C.J., Dodd J. and Samuels J.), that there was jurisdiction in the County Court of Wicklow to entertain the application, as the two Legislatures had mutually agreed to bind each other's subjects for a specific purpose and for a transitory period.

APPEAL by the prosecutor, James Ashley Armstrong, secretary of Messrs. Elder & Fyffe's, Ltd., shipowners, having their registered office at 31 & 32 Bow Street, London, from an order of the King's Bench Division dated February 22nd, 1924, refusing the prosecutor's application for a writ of prohibition against the County Court Judge of Wicklow.

An accident occurred to the applicant and appellant on 19th May, 1922, in the harbour of Kingston, Jamaica, on board the S.S. "Manister," owned by the respondents, Elders & Fyffes, a limited company, whose registered office is in Bow Street, London. The applicant had his residence at the time of the accident and of the application in Arklow, in the County of

(1) In the Court of Appeal, before O'CONNOR M.R., RONAN L.J., and PIM J.

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Wicklow. The ship is a British ship, registered of the port of Liverpool. On 1st September, 1923, after the Constitution of the Irish Free State, enacted by 13 Geo. 5, Sess. 2, c. 1, had come into operation, and before the establishment of Courts for the Irish Free State, the applicant issued in the County Court of Wicklow a request for arbitration under the Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), between him and the respondents.

The appellant appealed from an order of the King's Bench Division allowing cause shown by the respondent against making absolute a conditional order for the issue of a writ of prohibition directed to the County Court Judge of Wicklow, to prohibit him from entertaining the application for the request for arbitration. The conditional order was made on the ground that the said Court had no jurisdiction to hear or entertain the arbitration proceedings, inasmuch as the subject-matter thereof was without the jurisdiction of the Irish Free State.

Serjeant Hanna K.C. and *Jellett K.C.* (with them *Sainsbury*), for the appellant :—

Prior to the signing of the Treaty between Great Britain and Ireland and the enactment of the Free State Constitution Act, 1922 (13 Geo. 5, Sess. 2, c. 1), the Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), sect. 7, applied to seamen, provided they were workmen within the meaning of the Act, and were members of the crew of "any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides, or has his principal place of business in the United Kingdom": sect. 7, sub-s. 1. The unit in regard to jurisdiction was, therefore, the United Kingdom. The appropriate procedure is indicated by Sch. II, sect. 11, which provides that proceedings shall be instituted in the County Court of the district in which all the parties concerned reside, or, if they reside in different districts, the district prescribed by rules of Court. Rule 81 of the Consolidated Workmen's Rules, 1917 (Statutory Rules and Orders, 1917, No. 529), provides that if the accident out of which the matter arises occurred at sea, proceedings may be brought (*a*) in the division in which the ship shall be when the matter is to be done, or (*b*) in the division comprising the port of registry of the ship, or (*c*) in the division in which the workman or the dependants of the workman or one or more of them resides or reside. Rule 14, regulating service, provides that, "where the accident occurred in Ireland, and any respondent resides in England or Scotland, service on such respondent may be effected in accordance with this rule, and service so effected shall be deemed to be sufficient." Service may be effected either in accordance with the rules as to service of ordinary civil bills or by registered post. We argued in the Court below that in this case there could have been no service out of the jurisdiction, and that an English shipowner could not have been brought into an

Irish County Court; but having regard to the decision in *Rex* v. *Owen* (1), we now admit that the applicant could under the old state of affairs have brought his case in the Wicklow County Court.

The United Kingdom referred to in the Workmen's Compensation Act, 1906, is no longer the unit. Under the Treaty of December 6th, 1921, Articles 1, 2, and 3, the Irish Free State is a dominion; it is an absolutely free and independent country, self-governing and self-legislating; and, so far as jurisdiction is concerned, is in the same position in regard to Great Britain and Northern Ireland as a foreign country. The force of law was given to the Treaty by the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), passed one month before the applicant in this case entered into the contract with the respondents. On December 5th, 1922, the Irish Free State Constitution Act (Sess. 2, 13 Geo. 5, c. 1) was passed; and Article 2 says that the Constitution shall be construed with reference to the Articles of Agreement for a Treaty.

The Adaptation of Enactments Act, 1922 (No. 2 of 1922), sect. 3, declares that for the purpose of the construction of any British statute the name "Ireland," whether used alone or in conjunction with the expression "Great Britain," or by implication as being included in the expression "United Kingdom," shall mean Saorstat Éireann. Sects. 9 and 11 contain references to the "late United Kingdom"; and in a number of other statutes passed by the Oireachtas similar provisions are to be found.

The Irish Free State (Consequential Adaptation of Enactments) Order (Statutory Rules and Orders, 1923, No. 405) lays down that reference in any enactment passed before the establishment of the Irish Free State to "the United Kingdom," or "the United Kingdom of Great Britain and Ireland," or "Great Britain and Ireland," or "Great Britain or Ireland," or the "British Islands," or "Ireland" shall in the application of any enactment to any part of Great Britain and Ireland, other than the Irish Free State, be construed as exclusive of the Irish Free State.

The question in this case is whether Articles 73 and 75 of the Constitution confer the jurisdiction claimed upon the County Court Judge of Wicklow. The effect of these two Articles, taken in conjunction with the Treaty, is to put the Irish Free State in the position of a dominion. Prior to the Treaty the United Kingdom, as then constituted, did not in relation to foreign countries exercise extra-territorial jurisdiction. In regard to jurisdiction, the Free State is in the same position as a foreign country. "The same jurisdiction as heretofore," mentioned in Article 75 of the Constitution, does not embrace the jurisdiction claimed in this case, because such jurisdiction never existed in Ireland before, nor has it existed in any part of the British Empire.

(1) [1902] 2 K. B. 436.

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[They cited the following authorities:—*Lloyd* v. *Guibert* (1); *"The Halley"* (2); *Emanuel and Others* v. *Symon* (3); *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (4); *MacLeod* v. *Attorney-General for New South Wales* (5); *Jefferys* v. *Boosey* (6); *"The Annette," "The Dora"* (7); *"The City of Agra"* (8); *Yelverton* v. *Yelverton* (9); *Panagotis* v. *Owners of S.S. "Pontiac"* (10); *Wakely* v. *Triumph Cycle Co.* (11); *Blackwood* v. *The Queen* (12); *Attorney-General for Canada* v. *Cain and Gilhula* (13); *"The R. L. Alston"* (14); *In re Busfield, Whaley* v. *Busfield* (15); *Mayor, etc., of London* v. *Cox* (16); *Firebrace* v. *Firebrace* (17).]

FitzGibbon K.C. (with him *T. Sullivan K.C.* and *Costello*), for the County Court Judge of Wicklow:—

Until new Courts are established in the Irish Free State the former jurisdiction exists undiminished. The ratification by the Imperial Parliament of the Constitution Act passed by the Constituent Assembly of Dáil Éireann gave power to the existing Courts in the Free State to exercise jurisdiction during the interregnum in a case like the present under the Workmen's Compensation Act, 1906. The existing Courts in the Irish Free State are not "temporary Courts," as described by Atkin L.J. in *Wakely* v. *Triumph Cycle Co.* (11). Even if that case were good law, it could not apply to the County Courts. It cannot be contended that after the Treaty was signed the Imperial Parliament had no power to legislate for the Free State. "The legislative authority of Parliament extends over the United Kingdom, and all its colonies and foreign possessions, and there are no other limits to its power of making laws for the whole Empire than those which are incident to all sovereign authority—the willingness of the people to obey or their power to resist": May's Parliamentary Practice, 12th edition, p. 44. Since the Treaty the Imperial Parliament passed the Constitution Act; and it is clear from Article 75 that the jurisdiction formerly exercised under the Workmen's Compensation Act, 1906, is preserved so long as the Courts named in the Article continue to exist.

A. E. Wood K.C. (with him *Cherry*), for the workman:—

A writ of prohibition does not lie to a County Court Judge sitting and adjudicating as arbitrator under the Workmen's Compensation Act: *Turner* v. *Kingsbury Collieries, Ltd.* (18).

Jellett, in reply.

Cur. adv. vult.

(1) L. R. 1 Q. B. 115
(2) 2 Privy Council App., 193.
(3) [1908] 1 K. B. 302.
(4) [1894] A. C. 670.
(5) [1891] A. C. 455.
(6) 4 H. L. C. 815.
(7) [1919] Prob. 105.
(8) [1898] Prob. 198.
(9) 1 S. & T. 574.
(10) [1912] 1 K. B. 74.
(11) [1924] 1 K. B. 214.
(12) 8 A. C. 82.
(13) 22 T. L. R. 757.
(14) 8 Prob. 5.
(15) 32 Ch. Div. 123.
(16) L. R. 2 H. L. 239.
(17) 4 Prob. 63.
(18) [1921] 3 K. B. 169.

On April 7th the Master of the Rolls announced that the Court had come unanimously to the conclusion that the appeal should be dismissed with costs, and that at a later date they would state their reasons.

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May 23.

O'CONNOR M.R.:—

This is an appeal from an order of the King's Bench Division, dated 22nd February, 1924, allowing cause shown against a conditional order for the issue of a writ of prohibition against the County Court Judge of the County of Wicklow, prohibiting him from hearing an application by one Michael Bolger for compensation under the Workmen's Compensation Act, 1906, for an accident which occurred to him in the harbour of Kingston, Jamaica, on board the S.S. "Manister," owned by Messrs. Elders & Fyffes, whose registered office is in Bow Street, London.

Bolger, the applicant, resides in Arklow, in the County of Wicklow. The ship is a British ship, registered of the port of Liverpool. The owners, in whose employment Bolger was, have no office or place of business in Ireland. The accident occurred at sea. In these circumstances it is contended by the appellant that there is no jurisdiction in the County Court Judge of Wicklow to entertain the application for compensation. The King's Bench Division held that there is jurisdiction, and accordingly allowed the cause shown, and discharged the conditional order for a writ of prohibition.

The main argument turned on the effect of the Constitution of the Irish Free State. It was contended that if the County Court Judges in Ireland, sitting as arbitrators under the Workmen's Compensation Act, 1906, had originally jurisdiction over employers who resided in and had their places of business in England when the applicants for compensation resided in Ireland, that jurisdiction has been circumscribed by the Constitution, and is now confined to the territorial limits of the Irish Free State. In dealing with this question I will assume, as indeed I am of opinion, that the Workmen's Compensation Act, 1906, gave the County Court Judges a jurisdiction extending to the limits of the late United Kingdom.

The learned counsel for the appellants, with a view to laying a foundation for their argument in support of a limited territorial jurisdiction, referred with emphasis to the leading terms of the Treaty between Great Britain and Ireland which led up to the Constitution. They cited the first and second Articles, which declared that Ireland should have the same constitutional status in the community of nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa; and that the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise should be that of the Dominion of Canada, and the law, practice, and

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constitutional usage governing the relations of the Crown and the representatives of the Crown and of the Imperial Parliament to the Dominion Parliament shall govern their relationship to the Irish Free State. The reference to the Treaty was not merely legitimate, but cogent in the introduction to the argument that the Irish Courts exercising jurisdiction under the Constitution have no power outside the limits of the Free State. The observation is obvious that as the Courts of the British Dominions beyond the Seas under their several Constitutions have no jurisdiction over residents in England, it was not the intention of the Treaty that the Courts of the Irish Free State should have such jurisdiction. This argument becomes more forcible when the language of the Constitution, which gives jurisdiction to the Courts of the Irish Free State, is considered. The question turns on the Constitution—its construction and effect.

The Constitution derives its validity from two Acts—one the Act of Dáil Éireann sitting as a Constituent Assembly; the other the Act of the Parliament of the United Kingdom. In the first is contained the declaration that the Constitution shall be construed with reference to the Articles of Agreement for the Treaty between Great Britain and Ireland, and that if any provision of the Constitution is in any respect repugnant to any of the provisions of the Treaty, it shall, to the extent only of such repugnancy, be absolutely void. In the second Act—that is, the Act of the United Kingdom—the declaration in the constituent Act is recited; and by sect. 1 it is enacted that the Constitution shall, subject to the provisions to which the same is by the constituent Act made subject as aforesaid, be the Constitution of the Irish Free State. The declaration in the constituent Act has therefore the full force and effect of law.

We have, then, in dealing with the Constitution so far as it concerns the matter in hand—that is, the extent of the jurisdiction of the Irish Courts—to see whether there is anything in it repugnant to the Treaty. We have to do more, because the Constitution is to be construed with reference to the Treaty, which, as I understand, involves the obligation on a Court called on to interpret it in any case of doubtful construction, to adopt such a construction as would be consistent with the Treaty and in furtherance of its policy. With these considerations in mind, I now take up the Constitution.

The question at issue turns principally on Articles 73 and 75. Article 73 says: "Subject to this Constitution, and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same, or any of them, shall have been repealed or amended by enactment of the Oireachtas." Article 75 says: "Until Courts have been established for the Irish Free State in accordance with this Constitution, the Supreme Court of Judicature, County Courts, Courts of Quarter Sessions, and Courts of

Summary Jurisdiction, as at present existing, shall for the time being continue to exercise the same jurisdiction as heretofore." Now, the way in which these two Articles are applied to the case is this. It is said that at the date of the coming into operation of the Constitution a workman whose residence was in Ireland, and who had met with an accident involving personal injury in the course of his employment, could enforce his claim against his employer under the Workmen's Compensation Act in a County Court in Ireland no matter in what part of the late United Kingdom the accident happened, and no matter in what part of the United Kingdom the employer resided or carried on his business; and that if the accident happened at sea (as in the present case) to a seaman on board a ship registered in the United Kingdom, or any other British ship of which the owner, managing owner, or manager resided or had his principal place of business in the United Kingdom, such seaman, if resident in Ireland, could enforce his claim in a County Court in Ireland. That being the law at the date of the coming into operation of the Constitution, it is contended that the law is still the same, as the Workmen's Compensation Act, 1906, has not been repealed or amended by the Oireachtas. Then it is further said that, as Courts have not yet been established for the Irish Free State, the Courts in existence when the Constitution became operative (being the present Courts) have, under Article 75, the same jurisdiction as heretofore; and that as they previously had jurisdiction attracted by mere residence of a workman in Ireland over employers in England and Scotland, they have the same jurisdiction now. Now, I confess that during the argument I was completely overcome by this presentation of the case, and particularly since it was adopted by the learned Lord Chief Justice in what seemed to me to be a convincing judgment. Indeed, I entertained no doubt of the soundness of that judgment; and as there was at the time uncertainty as to the tenure of the existing Courts, I thought it right that we should give judgment at once. I joined with my brothers in giving judgment dismissing the appeal. Now, on a further consideration of the case, I feel bound to say that I entertain grave doubts about our judgment, and I think that it is my duty to state how they arose. A closer study of the Constitution has led me to think that we did not put the proper interpretation on Articles 73 and 75.

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By Article 73 the laws which are continued are "the laws in force in the Irish Free State." What does this mean? Does it mean that a law of the late United Kingdom, and enforceable in every part of it by the Irish Courts, is still and to the same extent enforceable by Courts temporarily acting for the Free State, which has ceased to be part of the United Kingdom? or does it only mean that the law shall continue in force within the Irish Free State—within it in the sense that while it shall continue to operate within the Free State, it cannot impose any extra-territorial obligation? The words, "in force in the Irish

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Free State'' are no doubt ambiguous; but I think that their true meaning may be ascertained by reference to another Article of the Constitution. I refer to Article 2: ''All powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland, and the same shall be exercised in the Irish Free State through the organizations established by or under and in accord with this Constitution.'' Here we have the words ''in the Irish Free State,'' and they must be used in the sense of within the Irish Free State—that is, imposing a strictly territorial limitation confining the exercise of jurisdiction over citizens of the State, or those residing within the limits of the State. I say that this must be the meaning, because all power and all authority is declared to be derived from the people of Ireland, and they can have no power or authority over the people of another country.

Finding, therefore, the meaning of the words, ''in the Irish Free State,'' in Article 2 to exclude extra-territorial jurisdiction, I think it is legitimate to give the same words the same meaning in Article 73, particularly since the laws in force at the date of the coming into operation of the Constitution derive their present force from the Constitution, whose authority is asserted by Article 2. I now go to Article 75, which declares that the existing Courts shall continue to exercise the same jurisdiction as heretofore. It is necessary to define what exactly is here meant by jurisdiction. It does not mean that the existing Courts are to administer the same law as heretofore. It means that our status as Judges is continued, the status carrying with it the right to administer, not the same laws, but the laws of Saorstat Éireann, comprising the previous law, all amendments thereof, and all law enacted by the Oireachtas. This, I am now inclined to think, is the proper meaning of the words, ''to continue to exercise the same jurisdiction.'' They cannot mean that we are to administer the same laws, because then we would have no power to administer the law as enacted by the Oireachtas. If this is the true interpretation, Article 75 does not give any wider jurisdiction than is given by the laws referred to in Article 73. This Article, taken by itself, is no doubt ambiguous; but here comes in the importance of the statutory provisions that the Constitution shall be construed with reference to the Treaty. This means, as I have already said, that if there is any clause of doubtful construction, a guide to the true construction is to be looked for in the Treaty; if there is repugnancy, so much of the Constitution is void and inoperative.

Now, the Treaty says that Ireland is to have the same constitutional status as the several colonies, and that the position of Ireland shall be that of Canada; but not one of the colonies has the power to impose the jurisdiction of its own Courts over an Englishman resident in England for something done in England. If the Irish Free State has such a power, its Constitution is fundamentally different in

this respect from that of any of the colonies, including Canada. I think that this consideration affords the very strongest reason for construing Article 73 as not intending to give to any law extra-territorial operation. I feel driven to go so far as to say that the other construction would be repugnant to the Constitution. The opening words of Article 73—"Subject to the Constitution"—were inserted with a meaning: that is, that no law was to be accepted in its entirety if inconsistent with the Constitution. The inconsistency in the present case becomes more apparent if it is illustrated by a proceeding commenced by a workman resident in England against a Free State citizen resident in Ireland on account of an accident at sea. On these grounds alone, and because the jurisdiction claimed is inconsistent with the constitutional idea, which is the foundation of colonial legislation, I am inclined to the opinion that the jurisdiction contended for by the respondents has ceased to exist. But there is much more to be considered. Under the Workmen's Compensation Act there is a right of appeal to the House of Lords. Under the Constitution there is no such right: Articles 66 and 75. If, therefore, the Courts in the Irish Free State have jurisdiction under the Act over persons living in Great Britain, they have been deprived of a legal right previously vested in them. True, there is a right to petition His Majesty for special leave to appeal to His Majesty in Council. But this is not the same thing. The appeal is to a different tribunal, and the right to appeal is not absolute.

Now, there is nothing whatever in the Treaty or the Constitution, or the Acts confirming it, which indicates any intention to deprive a British subject of his vested right to appeal to the House of Lords—his own domestic forum. If there was any such intention, it should and would have been expressly dealt with. It is not expressly dealt with, and it would require an implication of the most imperative character to work the change. I go on from this to consider other legislative enactments, which have an intimate bearing on the operation of the Workmen's Compensation Act, 1906, since the establishment of the Irish Free State. By the Irish Free State (Consequential Provisions) Act, 1922, His Majesty got power by Order in Council (sect. 6) to make such adaptations of any enactments so far as they relate to any of His Majesty's dominions, other than the Irish Free State, as might appear to him to be necessary or proper as a consequence of the establishment of the Irish Free State. Under this Act an Order in Council was made, the Irish Free State (Consequential Adaptation of Enactments) Order, 1923. Sect. 2 of this Order is as follows: "Subject to the provisions of this Order, and of any subsequent Order in Council made under sect. 6 of the Irish Free State (Consequential Provisions) Act, 1922, references in any enactment passed before the establishment of the Irish Free State to 'the United Kingdom,' or 'the United Kingdom of Great Britain and Ireland,' or 'Great Britain and

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Ireland,' or 'Great Britain or Ireland,' or 'the British Isles,' or 'Islands,' shall, in the application of the enactment to any part of Great Britain and Ireland other than the Irish Free State, be construed as exclusive of the Irish Free State, except that in the Acts mentioned in the schedule to this Order any such expression as aforesaid shall, to the extent specified in that schedule, be construed as including the Irish Free State.

Now, what is the meaning of this? Is it not a recognition that all previous legislation by the Parliament of the United Kingdom ceased to have effect in the new State which had been set up, and that so far as any such legislation affected the Irish Free State, it could only continue to affect it by its adoption by the Irish Free State Constitution, an adoption which had in fact been made by the 73rd Article? That part of Ireland which is now the Free State is by the Order struck out of every statute, except in the special cases mentioned. The object was to make every such statute a purely British and North of Ireland statute. Now let me see how the Order specially applies to the Workmen's Compensation Act. Reading the Act, I find that "United Kingdom" is mentioned in sects. 2, 7, and 11. In these sections, therefore, "United Kingdom" is to be read as exclusive of the Irish Free State, or, in other words, as meaning Great Britain and the six counties known as Northern Ireland. Sect. 2 provides for giving notice of an accident and making a claim within certain periods. It provides that want of notice or failure to make a claim within the prescribed period may be excused by absence of the claimant from the United Kingdom. Under this proviso, absence in any part of Ireland would not have been an excuse; but as United Kingdom is now to be construed as meaning only Great Britain and Northern Ireland, absence in the Irish Free State would be an excuse. In other words, the Irish Free State is put in the same category as a foreign country. Sect. 7 applies the Act to seamen members of the crew of any British ship registered in the United Kingdom, or any British ship of which the owner or manager resides or has his principal place of business in the United Kingdom. The effect of the Order on this is that a seaman on a ship registered in Ireland, and whose owner and manager resides in Ireland and has his principal place of business in Ireland, has no right in England under the Act. The Irish Free State is again made a foreign country. Sect. 11 gives the right to detain ships on its being shown that none of the owners resides in the United Kingdom. In a similar way the Irish Free State is made a foreign country. Now, I refer to these sections as affected by the Order in Council for the purpose of showing that they support the view that in Great Britain and Northern Ireland the Act is to be administered in a separate compartment, whereas before the establishment of the Irish Free State it was to be administered for England, Ireland, and Scotland, regarded as a unit for administration. Ireland has been severed from that unit. So

long as the original unit remained in its entirety there was reason for any Court in any district thereof exercising jurisdiction in any other district; but once the unit became broken up into parts the reason for the jurisdiction of the Courts of one part over another ceased; the more so when one part is treated as a foreign country. I cannot, however, go away yet from the Order in Council. There are some special provisions in it which require notice. It will be remembered that sect. 2, which gives restricted meanings to such expressions as "the United Kingdom," &c., is made subject to the exception that in the Acts mentioned in the schedule to the Order any such expression shall, to the extent specified in that schedule, be construed as including the Irish Free State. The Workmen's Compensation Act is mentioned in the schedule, and there are two sections of the 1st schedule to the Act brought within the exception, viz., sects. 6 and 18. "United Kingdom" is found in each, and therefore the expression is still to cover the Irish Free State. From this it might be inferred that the Act was still to be administered in Great Britain and Ireland as it was before the establishment of the Irish Free State, but an examination of the sections will not bear this out. Sect. 6 says that rules of Court may provide for the transfer of money paid into Court under the Act from one Court to another, whether or not the Court from which it is to be transferred is in the same part of the United Kingdom as the Court to which it is to be transferred. Now, this does not involve any exercise of jurisdiction by the Court of one district over a person residing in another district. When the money was paid into Court by the employer, the jurisdiction over him had been already exercised. There only remained to be done the matter of payment either to the workman or to his dependants. The transfer is only a matter of convenient banking—the transfer of an account. Sect. 18 of the 1st schedule to the Workmen's Compensation Act provides that if a workman receiving a weekly payment ceases to reside in the United Kingdom, he shall thereupon cease to be entitled to receive it, subject to an exception. If United Kingdom here was to be understood as excluding the Irish Free State, a workman coming to live here would lose his weekly payment. It was thought that that would be hard and unreasonable, and therefore, for the purposes of the section, United Kingdom is still to be read as including the whole of Ireland—in other words, that although portion of Ireland had ceased to be part of the United Kingdom, and had become a foreign country for the purposes of the Act, residence in it would not work a forfeiture. I do not think that this conflicts with the view which I have presented.

Before I go away from the Order in Council I must advert to sect. 16 thereof. This enacts that nothing in the Order shall affect the construction in its application to the Irish Free State of any Act which, by virtue of Article 73 of the Irish Free State Constitution, is to continue in force within the Irish Free State.

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It seems to me that this section was inserted only ex abundanti cautela, because no Order in Council could affect the construction of an Act in its application to Ireland under the Constitution; but the section is important because it indicates the limits within which the Act must be administered by the Irish Free State—that is, within the Irish Free State, not outside it, which the assumption of extra-territorial jurisdiction would involve. The whole Order as a piece of legislation only affects Great Britain and Northern Ireland; but it is legally operative as a disavowal, which, I think, it involves, of all jurisdiction of Irish Free State Courts over citizens of Great Britain and Northern Ireland.

I must now refer to the Adaptation of Enactments Act (No. 2, 1922, Saorstat Éireann). It has an intimate bearing on the Workmen's Compensation Act in its application to Ireland. Sect. 11 enacts that: "Subject and without prejudice to the specific adaptations made by this Act, or by any Order made under the authority of this Act, every mention or reference contained in any British statute of or to any Minister, official, department, or authority of the Government of the late United Kingdom, or of the late British Government in Ireland, including the Lord Lieutenant, exercising executive functions, shall in respect of the doing or not doing of any act, matter, or thing after the 6th December, 1922, be construed and take effect as a mention of or reference to the Minister, official, department, or authority in Saorstat Éireann exercising in Saorstat Éireann functions the same as or corresponding to the functions exercised in respect of the area now comprised in Saorstat Éireann by such Minister, official, department, or authority of the Government of the late United Kingdom or the late British Government in Ireland prior to the 6th December, 1921." Let me see how this affects the Workmen's Compensation Act. I will give an instance. Sect. 8 applies the Act to certain diseases, and gives certain powers to the Secretary of State, and inter alia a power to make Orders extending the provisions of the section to other diseases and other processes. The Secretary of State has now no authority in Ireland. His functions are exercisable by the corresponding officer in Saorstat Éireann, so that it is possible to have Orders made by the Secretary of State regulating diseases in England, and dissimilar Orders made by the corresponding officer in Ireland. It seems to me that this is one more consideration for holding that Great Britain and Northern Ireland on one side, and the Irish Free State on the other, must be regarded as two separate and independent units in the administration of the Act, neither having through its Courts any jurisdiction over the other.

For these reasons, which I now feel bound to state, I have a great misgiving about the judgment which, in conjunction with my colleagues, I gave during last sittings.

RONAN L.J.* :—

Having listened to the judgment of the Master of the Rolls, and having given to it the best consideration I could, and having also had the advantage of reading the judgment of Pim J., I prefer the original opinion of the Master of the Rolls to that which he has just expressed. The whole of the judgment of the Master of the Rolls depends on the words of Article 75 of the Constitution: "Until Courts have been established for the Irish Free State (Saorstat Éireann) in accordance with this Constitution, the Supreme Court of Judicature, County Courts, Courts of Quarter Sessions, and Courts of Summary Jurisdiction shall, for the time being, continue to exercise the same jurisdiction as heretofore." The Master of the Rolls says that these words are ambiguous. To my mind the Article is framed in perfectly clear and unequivocal language. Until the date of the Treaty the Imperial Parliament was the plenary Parliament, with jurisdiction over England, Ireland, and Scotland. Having that plenary jurisdiction, it passed the Workmen's Compensation Act of 1906 (7 Ed. 7, c. 58), and the Irish Free State Constitution Act, 1922 (13 Geo. 5, Sess. 2, c. 1), did not come into force until it had been passed by the Imperial Parliament. We have to construe the Constitution like any other statute. The provisions of the Constitution must prevail unless they have been repealed or are inconsistent with the Treaty. The object of the Constitution was to substitute a new Legislature for the old one, and new Courts for the old ones. It is remarkable that in defining the powers of the new Legislature the Constitution went further than the Treaty. The Treaty gave the new Legislature power to make laws for the peace, order, and good government of Ireland; but the Constitution says that the Oireachtas is to have exclusive power to make such laws.

It takes some time to make new laws and establish new Courts. Is the country to be left in the meantime without any law or any Courts? Provision must be made for the interregnum. What was done? There were laws existing at the time, and they were binding upon England, Ireland, and Scotland; there were Courts in Ireland with a certain jurisdiction. The Constitution provided that the existing Courts should continue until new Courts were created. Is there anything in that provision inconsistent with any Article in the Treaty?

Article 73 of the Constitution provides that: "Subject to this Constitution, and to the extent to which they are not inconsistent therewith, the laws in force in the Free State (Saorstat Éireann) at the date of the coming into operation of this Constitution (that is, the laws passed by the United Kingdom Parliament and the common law) shall continue to be of full force until the same or any of them shall have been repealed or amended by enactment of the Oireachtas." But for that Article there would be no law

* This judgment has not been revised by Ronan L.J.

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at all in the country. Taking the words of Article 75, which say that until Courts have been established for the Irish Free State the existing Courts shall, for the time being, "continue to exercise the same jurisdiction as heretofore," the Master of the Rolls says that the jurisdiction is to be exercised in the Free State. A limit is not put upon the jurisdiction because the Courts sit in Ireland. What jurisdiction is given? The same jurisdiction as heretofore. When the High Court in London makes an order for service out of the jurisdiction it exercises that jurisdiction in England, though its order is that something shall be done elsewhere. I do not intend to follow the Master of the Rolls in his learned and microscopic examination of the Orders in Council. All I say is that the Orders in Council which he has quoted do not apply to the Free State at all. On the ground that in the intervening time we must have some law, I think the conclusion we came to on the last occasion was right.

PIM J.:—

From the beginning of the arguments I was impressed by the strength of the appellant's position, and for some time I could not find any satisfactory answer to it. Serjeant Hanna took his stand on the words of Lord Selborne in the case of *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* (1): "No territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to a power which so legislates"; and further: "In a personal action a decree pronounced 'in absentem' by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is, in international law, an absolute nullity."

Now, apart from the question whether prohibition is the proper remedy—a question which I need not now discuss—if the doctrine laid down in the above quotations applies to the case before us, the appellants must, in my opinion, succeed. The whole question is, does the doctrine apply? That depends upon the facts. In my opinion there is no doubt that, before the Treaty, the County Court Judge of Wicklow had the jurisdiction now claimed for him. Subject to a question arising under the wording of the rules as to service out of the jurisdiction, Serjeant Hanna, in his opening statement, admitted that he had such jurisdiction. The question is, was it ever taken away from him; and, if so, when and how? The Treaty was entered into on the 6th of December, 1921. If the effect of the Treaty had been to set up and establish there and then the Free State, I think any extra-territorial jurisdiction which the Courts in Ireland had possessed up to that time would, by force of such establishment, have ceased to exist, for from that moment no one outside Ireland would have owed any allegiance or obedience to the Irish Govern-

(1) [1894] A. C. 684.

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ment. I do not see how it could be otherwise, nor do I think it makes any difference whether the separation from Great Britain had been complete or whether there still existed the slight and uncertain tie involved in what is called "Dominion status." But was the Free State established by the Treaty? And, if not, when was it established? At the time the Treaty was entered into Ireland was subject to the old United Kingdom Constitution as modified for Ireland by the Government of Ireland Act, 1920. The Treaty itself recognised this, for by sect. 17 it provided for the summoning of the members of Parliament elected for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, in order that a Provisional Government should be appointed. These members were summoned, a Provisional Government was formed, and the members, having adopted the Treaty, became a Constituent Assembly. There was as yet no Free State, and the Act of 1920 was still the law of the land.

On the 31st March, 1922, the British Legislature passed the Irish Free State (Agreement) Act, 1922, by which the Treaty was ratified. If the Treaty itself was only executory, there was nothing in that Act which changed the condition of affairs. On the 5th of December, 1922, the Constitution, having in the meantime been framed, approved of, and passed by the Constituent Assembly in Ireland, was ratified by the British Parliament by the Irish Free State Constitution Act, 1922. By an Act passed on the same day, and called the Irish Free State (Consequential Provisions) Act, 1922, the Government of Ireland Act, 1920, was repealed. It was only on the passing of these two Acts and the proclamation of the Constitution that the Free State came into definite existence. Now, up to its repeal, as I have said, the Government of Ireland Act, 1920, was, so far as the Courts of Ireland and the jurisdiction of the Courts of Ireland were concerned, the Constitution of Ireland. Under that Act the County Court Judge of Wicklow had jurisdiction to hear the case in respect of which prohibition is sought, and nothing had, in law, happened to take that jurisdiction from him until the Act was repealed and the Free State established; and the question is, was his jurisdiction as from that date taken from him?

Article 73 of the Constitution is as follows: "Subject to this Constitution, and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstat Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same, or any of them, shall have been repealed or amended by enactment of the Oireachtas." And Article 75 is, so far as it is necessary to quote it, as follows: "Until Courts have been established for the Irish Free State (Saorstat Éireann) in accordance with this Constitution, the Supreme Court of Judicature, County Courts, Courts of Quarter Sessions, and Courts of Summary

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Jurisdiction, as at present existing, shall for the time being continue to exercise the same jurisdiction as heretofore." The discussion before us was very largely concerned with the legal meaning and effect of these two Articles. It was argued on behalf of the appellants — and the argument is not without cogency—that as a country cannot legislate for foreigners, any legislation which seems to affect foreigners must be presumed to be legislation for its own subjects: *Cope* v. *Doherty* (1). Article 73 must, in consequence, so far as it seems to affect foreigners, be taken to have reference only to such laws as had no extra-territorial effect. If that view be correct, it follows that the Act of the British Parliament did not enlarge the legal effect of such Article.

The Master of the Rolls has put forward a somewhat similar argument. He says that Article 73 must be read along with Article 2 of the Constitution, which declares that all legislative authority is derived from the people of Ireland; and as the people of Ireland have no power or authority over people of another country, Article 73 must be read as touching only such laws as are of application to the Free State and the inhabitants thereof. As to this latter contention, I desire to say a few words. I agree that Article 73 may be read with Article 2 of the Constitution; but how much further does that take us? Apart from the exact meaning of the phrase that all legislative authority is derived from the people of Ireland, the particular Article in question purports to be derived from the people of Ireland. I agree that the people of Ireland have no power over people of another country; and the question is, not whether they have such power or authority, but whether their Government and the Government of Great Britain have agreed for a special purpose and for a short period to grant to each other certain powers which neither would have had without mutual legislation? The Master of the Rolls says that Article 73 is ambiguous. The words in themselves are not only not ambiguous, but are very clear. It is their exact legal effect that is in dispute. He further says that to give the meaning to Article 73 which the respondent asks to be given to it would be repugnant to the Treaty, and that by the preamble of the Constitution anything repugnant to the Treaty is declared to be absolutely void and inoperative. I do not think the question of repugnancy comes in at all. There is nothing repugnant to the Treaty in both parties agreeing that one or both should have certain powers which they otherwise would not have. That is what, in my opinion, has occurred in this case. I need not advert to what the Master of the Rolls has said as to Article 75. It seems to me that, if he be right in his opinion of the meaning and effect of Article 73, the view he has expressed as to Article 75 naturally follows.

It has been further argued by the appellants that, as the

(1) 4 K. & J. 466.

Constitution itself declares that it must be considered with reference to the Treaty, and that as the Treaty declares that the Free State shall have the same constitutional status as the other Dominions, there can be no extra-territorial jurisdiction, even of a transitory nature, after the Free State comes into existence, because no Dominion has this jurisdiction. This seems to me to be only another way of putting the same argument. The question still remains whether this Court is legally bound to put a limited meaning on the plain and definite words of Article 73 and Article 75.

Two other matters were raised by the Master of the Rolls. His Honor calls attention to the fact that, if the proceedings can be brought in Ireland, the appellants will be unable to appeal to the House of Lords. In this I think he is right. The appeal would lie to the Privy Council; and I have no doubt that, as it is a matter between the subjects of the two States, the Privy Council would hear any such appeal. The argument has some force, as an argument, but that is all. There is nothing to prevent the Legislature of the two States agreeing that such should be the law. The Master of the Rolls has further dealt with a certain Order, dated March, 1923, made by the King in Council in pursuance of certain powers given to him by the Irish Free State (Consequential Provisions) Act, 1922. The Order is in the nature of an Adaptation of Enactments Order, and, amongst other things, purports to decree how certain words in the Acts of the United Kingdom should in the future be read. I would respectfully suggest that any argument founded on this Order is irrelevant. The Master of the Rolls himself admits that no Order in Council could affect the construction of an Act of Parliament, and even the King in Council may, like other people, go wrong in the interpretation of a section. In my opinion the Court should decide the matter before it without any regard to the Order in Council referred to, or to any Order in Council.

Having dealt with the matters raised by the Master of the Rolls in his logical and clear judgment, I must now come back to the question before the Court, namely, the meaning of Articles 73 and 75. They appear in the Constitution under the heading "Transitory Provisions." They were meant to be, and are essentially transitory. They were adopted to provide for the interregnum which must elapse between the establishment of the Free State and the putting into active operation of the powers thereby taken and granted. They were passed so that the business of the State should be carried on smoothly and without a hitch. Their essential object was to prevent any change in law or jurisdiction until the Irish Legislature (the Oireachtas) should have considered the changes necessary to be made, and should have enacted them. At the date of their becoming law the Workmen's Compensation Act, and every word of it, was in force; the jurisdiction of the County Court Judge of Wicklow existed. The Legislature of the Free State and the Legislature of Great Britain

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enacted that the Workmen's Compensation Act should remain in force, and that the jurisdiction of the County Court Judge of Wicklow should remain unimpaired. I cannot admit that either Legislature was not fully aware of the effect of its action; that would be to doubt the knowledge and the wisdom of the Legislatures. I admit that no Act of the Irish Legislature can bind a resident in Great Britain, nor can any Act of the British Legislature bind any resident in the Free State; but they can mutually bind each other's subjects for a specific purpose and for a transitory period. In my opinion the two Legislatures have deliberately done that, and have granted to each other for a period certain rights which neither of them would have had without the passing of the two Acts. If that be so, no subject of Great Britain can now be heard to say that his case cannot be heard by the tribunal of the Free State, nor could any subject of the Free State object to his case being heard by a Judge in Great Britain. The matter is one of very considerable importance, for, if the view of the appellants be correct, it may affect proceedings which have been heard in the Courts of both countries in ways that are perhaps not yet fully appreciated, and may have very serious consequences.

For the foregoing reasons I am of opinion that the County Court Judge of Wicklow still has jurisdiction to hear the case brought before him, and that the appeal fails. Whether any such jurisdiction will exist after County Courts have been set up under the Constitution is a matter which it is at present unnecessary to decide; but I think I am justified, for the reasons given in this judgment, in saying that, in my opinion, no such jurisdiction will exist.

Solicitors for the prosecutor: *Norris Goddard & Davidson.*
Solicitor for the County Court Judge of Wicklow: *M. A. Corrigan.*
Solicitors for the applicant: *M. J. O'Connor & Co.*

C. L.

JAMES ROLLESTON AND ALURED ROLLESTON, PLAINTIFFS; HERMON SINCLAIR, DEFENDANT (1).

(1923. No. 55.)

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(I. F. S.)
1924.

May 14, 15, 16, 23.

Will—Defective execution—Holograph testamentary paper—No attestation clause—Witnesses not present at same time—Exclusion of presumption: "Omnia praesumuntur rite esse acta."

A testatrix made her own will on a printed form, which contained instructions as to the formalities to be observed in order to ensure due execution. The dispositions, in the handwriting of the testatrix, were all contained in the blank space provided on the front page of the form. The testatrix signed her name at the foot of the dispositions, and underneath her signature were the signatures of two witnesses, A. L. and E. R. No attestation clause was added, but there was opposite the signature of each witness, on the left-hand side, the word "witness" in the handwriting of the testatrix. Testatrix, who was a very capable woman, told her solicitor that she had made her will; and when he said that he hoped that she had made it properly, said: "I had two witnesses. I did it on one of those printed forms which contained full instructions." The first witness, A. L., deposed that she saw the testatrix sign, but that she did not see the other witness, E. R., at the time, and could not remember if E. R. was in the room. Further examined, she deposed that E. R. did not sign in her presence. She had previously stated in a conversation with the solicitor that she and E. R. saw the testatrix sign the will. The second witness, E. R., deposed that A. L. was not in the room when she signed. E. R. also deposed that the word "witness" appearing opposite each of their signatures was not in the will at the time of execution. By direction of the learned Judge at the trial, the jury found that the will had not been duly executed.

Held by the Court of Appeal (O'Connor M.R. and O'Connor L.J., Ronan L.J. dissentiente), that the presumption of law, "omnia praesumuntur rite esse acta," did not apply; that there was no evidence of due execution; and that the learned Judge was right in directing the jury to find that the will was not properly executed.

Per O'Connor M.R.: The judgment of Palles C.B. in *Clery* v. *Barry*, 21 L.R.Ir. 152, is an authority for the proposition that it is only when witnesses (or other persons who, though not official witnesses to a will, were present) are dead, or cannot give evidence through incapacity, or their evidence cannot be accepted on account of unreliability, that the doctrine, "omnia praesumuntur rite esse acta," can be applied. It is to be called in aid only when there is a void to be filled.

Decisions relating to the application of the presumption of law—"omnia praesumuntur rite esse acta"—considered.

NEW TRIAL MOTION.

The plaintiffs applied for a new trial on the ground of misdirection of the jury by the learned Lord Chief Justice, and on the ground that he was wrong in withdrawing the case from the jury. The action was brought by James Rolleston and Alured Rolleston as executors to establish the will of Georgina Alice Sinclair, dated February 18th, 1922. The defendant, the second husband of the testatrix, pleaded that the will was not duly executed, and also that the execution of the will was obtained by the undue influence of James Rolleston, one of the plaintiffs.

(1) In the Court of Appeal, before O'CONNOR M.R., RONAN and O'CONNOR L.JJ.

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The will was on a printed form, filled up in the handwriting of the testatrix. All the dispositions were contained in the blank space on the first page of the form. Having given certain legacies to cousins, the testatrix bequeathed the residue of her estate to her son, Captain Walter Raleigh Trevelyan, by her first husband. She left nothing to her second husband. At the foot of the dispositions the will was signed as follows:—

"Georgina Alice Sinclair.
February 18th, 1922.
Witness: Anne Lloyd, spinster.
Witness: Elizabeth Rowntree, spinster."

The word "witness" opposite the name of each witness was in the handwriting of the testatrix. There was no attestation clause.

Mr. James Robert Cresswell, who had acted for some time as solicitor for Mrs. Sinclair, described in the course of his evidence an interview which he had had with the testatrix in June, 1923, as follows:—"I said to her, 'By the way, Mrs. Sinclair, have you made your will?' She said, 'I did,' and I said, 'I hope you have made it properly, as a well-known city merchant, who was a client of mine for some years, had frequently told me that he had made his will, and on his death I found his will in his safe, and there was only one witness.' And she said, 'I had two witnesses. I did it on one of those printed forms which contained full instructions.' " The testatrix was, he added, a wonderfully capable woman. When he heard that a caveat had been entered to the will, he said to Anne Lloyd, one of the witnesses to the will, through the telephone, that he wanted her to swear an affidavit as to the execution of the will, and she said she did not like signing documents of any kind; but that Mrs. Sinclair signed the will all right in her presence, and in the presence of Elizabeth Rowntree. During the course of a subsequent conversation, Anne Lloyd said to him that she and Elizabeth Rowntree saw Mrs. Sinclair sign the will.

Anne Lloyd examined, said Mrs. Sinclair had asked her to witness her will. She signed as a witness, and she saw the testatrix sign. The examination continued:—

"*Mr. Lynch K.C.*: Where was Miss Rowntree at that time? I did not see Miss Rowntree at the time.

"THE LORD CHIEF JUSTICE: Was she in the room? I can't remember if she was in the room at the signing of the will.

"Just look at that will—do you see Miss Rowntree's signature? Yes.

"Did Miss Rowntree make that signature in your presence? No; I was not there at the time.

"*Mr. Lynch K.C.*: Did you see Miss Rowntree put her name to that? No."

Elizabeth Rowntree, the other witness to the will, deposed that Anne Lloyd was not in the room when she signed her name

as a witness. Anne Lloyd's name was to the document at the time, but the word "witness" was not opposite the name of either witness.

There was no evidence of undue influence.

The Lord Chief Justice came to the conclusion that there was no case proper to be submitted to the jury in favour of due execution, and he directed the jury to find that the will was not duly executed. The jury found accordingly, and judgment was given condemning the will.

Serjeant Hanna K.C., Denning K.C. (with them *Lynch K.C.* and *Phelps*), for the plaintiffs:—

A presumption of due execution exists where there is a holograph will with an imperfect attestation clause, and where knowledge of the process of due execution is brought home, as in this case, to the testatrix. In *In the Goods of Frances Peverett* (1) the presumption of law, "omnia praesumuntur rite esse acta," was extended to the case of an informal holograph document, containing no attestation clause whatever, and in regard to which there was no evidence to prove the handwriting of one of the persons (both of whom were dead) whose names appeared near the signature of the testatrix at the foot or end of the document. The presumption has been maintained against the evidence of the witnesses to the will: *Dayman* v. *Dayman* (2). Where the presumption exists and the witnesses are examined and give evidence adverse to the will, the question of their veracity or credibility should be left to the jury: *Jackson* v. *Thomason* (3); *Dubourdieu* v. *Patterson* (4).

[Other authorities cited:—*Trott and Trott* v. *Skidmore* (5); *Owen* v. *Williams* (6); *Cooper* v. *Bockett* (7); *O'Meagher* v. *O'Meagher* (8); *Clery* v. *Barry* (9); *Clarke* v. *Clarke* (10); *Croft* v. *Croft* (11); *In the Estate of Strong, Strong* v. *Hadden* (12).]

Fetherstonhaugh K.C. and *Marnan*, for the defendant:—

In no case has it been held that the presumption applies to a will without an attestation clause where the witnesses are alive and available. In any event, the evidence here is overwhelming against the will; and, where only one conclusion can reasonably and properly be drawn from the evidence, judgment given for the party in whose favour the conclusion can be so drawn will not be disturbed: *Skeate* v. *Slaters, Ltd.* (13); *M'Evoy* v. *Calder* (14).

(1) [1902] P. 205.
(2) 71 L. T. 699.
(3) 1 B. & S. 745.
(4) 54 I. L. T. R. 23.
(5) 2 Sw. & T. 12.
(6) 4 Sw. & T. 202.
(7) 4 Moo. P. C. C. 419.
(8) 11 L. R. Ir. 117.
(9) 21 L. R. Ir. 152.
(10) 5 L. R. Ir. 47.
(11) 4 Sw. & T. 10.
(12) [1915] P. 211.
(13) [1914] 2 K. B. 429.
(14) 55 Ir. L. T. R. 121.

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Serjeant Hanna K.C., in reply:—

"Two things may be laid down as general principles. The first is, that the Court is always extremely anxious to give effect to the wishes of persons if satisfied that they really are their testamentary wishes; and, secondly, the Court will not allow a matter of form to stand in the way if the essential elements of execution have been fulfilled": *per* Sir Francis Jeune in *In the Goods of Frances Peverett* (1).

May 23.

O'CONNOR M.R.:—

This was a motion for a new trial on the ground that the learned Lord Chief Justice, who tried the action, misdirected the jury. The action was brought by the plaintiffs as executors to establish the will of Georgina Alice Sinclair, a married woman. The defendant is her husband, and he pleaded that the will was not duly executed, and also that it was obtained by undue influence. The plea of undue influence is out of the case. The only issue with which we are concerned is whether the will was duly executed.

The material facts are these:—The will was made on the 18th February, 1922. It was made on a printed form, such as is sold by stationers for the assistance of testators who, either for the purpose of saving the expense of employing a solicitor or keeping their testamentary dispositions secret, wish to draft their own wills. The form provided a blank for the name and address of the testator or testatrix. This was followed by a clause of revocation of former wills, a clause appointing executors, with a blank for the names, and a clause directing the executors to pay debts, funeral and testamentary expenses. Then came an empty space, intended to be used for the several dispositions to be made. This space extended over the whole of the first page, save what was occupied by the printed clauses which I have mentioned. On the back of the page the empty space was continued for the greater part, and towards the end of the back page there was a printed clause, with appropriate blanks for the date and the signatures of the testator and two witnesses, with a full attestation clause.

The dispositions are in the handwriting of the testatrix, and do not cover the space left therefor on the front page. There remained underneath sufficient space for the signatures of the testatrix and two witnesses, and an attestation clause. The testatrix signed her name at the foot of the dispositions—that is, of the entire will—and underneath her signature are the signatures of "Anne Lloyd, spinster," and "Ellen Rowntree, spinster." No attestation clause was added, but there is opposite each signature on the left-hand side, "witness" in the handwriting of the testatrix. There is no writing or mark on the back of the page. On the third page of the form are printed directions for the preparation and execution of wills. These are

(1) [1902] P. 205, at pp. 206, 207.

complete, and if attentively read by an educated and clear-headed person, ought to convey full information to the reader of all the necessary formalities. It would, perhaps, be too great an assumption to conclude that every intelligent person who had read these directions would thoroughly comprehend them, remember them, and act upon them. Legal directions require some legal training for full compliance. In addition to the directions contained on the third page of the form, there was in the fold of the form a specimen of a will duly executed, which contained a full attestation clause. To this specimen the attention of intending testators was directed.

The will has been fairly described as a holograph will. Although certain clauses which I have referred to are in print, the document may be treated as a holograph will. It also indicates good capacity in the testatrix. The disposing part, which is entirely in her own handwriting, and presumably her own composition, is in clear language, and shows a clear conception of her legal position. The will must also be placed in the category of wills without an attestation clause. True, there is a form of attestation clause on the back, but it was not used; it was, in fact, disregarded. This disregard of the attestation clause, which is part of the form intended to be used and part of the specimen will to which attention was directed, must not merely throw doubt on the supposition that the testatrix paid attention to the directions for execution, but suggests that she did not read the directions attentively and in detail, or, if she did, that she did not fully comprehend them, or, having at one time comprehended them, that she forgot the special direction as to execution when she came to make her will.

Now, there is no doubt about her own signature to the will. There is no doubt as to the signatures of the two witnesses. There is no doubt about her testamentary intention when she executed the document in question. The only doubt is as to the mode of execution, or—to put the question in its narrowest form —did she sign or acknowledge the will in the presence of the two witnesses, they being both present at the same time? I have told the story of the making of the will and the circumstances leading up to it so far as that story can be told by the document itself, and I ask myself—if I know nothing more than what I have related, could I be reasonably certain that the two witnesses were together present when the testatrix signed or acknowledged the will? There is nothing on the face of the will to show it. There is nothing to show that she realized the necessity of this special formality. She was not a professional person. There is nothing to show that she had ever made a will before. She did not attend to the attestation clause, which in substance she was informed she ought to use; and by writing separately opposite each witness's name the word "witness," instead of writing "witnesses" once as applying to both, she did that which implies that the signatures were not a joint witnessing at the same

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time, but two separate witnessing operations. I am referring only to the facts as shown by the will itself, and, on this, trying to form the best opinion I can, I cannot find anything to assure me or give me reasonable grounds for holding that the will was signed or acknowledged by the testatrix before the two witnesses present at the same time. I cannot assume due execution without sufficient evidence that the testatrix realized the necessity for having both present at the same time when the will was acknowledged, and had that present to her mind at the moment of execution.

But so far I have been only dealing with the case as a layman, apart from all principles of law, and I must see whether there is any legal principle which establishes this will without positive proof. The plaintiffs propounding the will have invoked the principle, "omnia praesumuntur rite esse acta," and say that there is a presumption that the will of Georgina Alice Sinclair was duly executed, and that that presumption must prevail unless rebutted by evidence. In my opinion no such presumption arises in this case, because of two circumstances: 1, the will contains no attestation clause; and 2, the witnesses to the will are living and were available. Counsel for the executors were not able to produce a single authority in aid of the presumption in such a case. In *Peverett's Case* (1) there was no attestation clause, but both witnesses were dead. The will was admitted to probate on the presumption of due execution, Sir Francis Jeune saying, "I am going to the furthest limit." In *Trott and Trott* v. *Skidmore* (2) there was no attestation clause, but here, again, the witnesses were dead, and the will was admitted to probate. *Clarke* v. *Clarke* (3) was relied upon by the appellants, but here, again, both the witnesses were dead, and there was an attestation clause, though an imperfect one. The attestation clause was in the words, "signed in the presence of." The will was a holograph. Even the names of the witnesses, who were illiterate and marksmen, were in the testator's handwriting, and the mark of each witness was attested by his handwriting. The whole document showed that the execution and witnessing were done at the same time. In these circumstances the will was admitted to probate. The feature which distinguishes the case most from the present one is that both witnesses were dead. *Clery* v. *Barry* (4) was the authority which was most pressed upon us. One of the witnesses was alive, and in that respect it is like the present case. But it differs essentially from the present case in the circumstance that there was a regular attestation clause, which means that there was on the face of the will a statement in detail describing all the formalities, and averring compliance with them—a most distinguishing feature. The will was condemned by Warren J., but his decision was reversed by the Court of Appeal, and the will was admitted to probate. The

(1) [1902] P. 205.
(2) 2 Sw. & T. 12.
(3) 5 L. R. Ir. 47.
(4) 21 L. R. Ir. 152.

foundation of the judgment was the principle, "omnia praesumuntur rite esse acta" and its application, notwithstanding the adverse evidence of the surviving witness and a third party, who was present at the execution. But the process by which the principle was applied is most enlightening, and is in confirmation of the general rule, as I conceive it to be, that it cannot be applied when evidence is really available. The witnesses proved themselves to be wholly unreliable, and the Chief Baron dealt with the case as if it were one with no available external evidence. This is clear from his judgment; at pp. 166–7 of the Report he says: "It is merely one of the instances of the application of the doctrine, 'omnia rite esse acta praesumuntur.' The principle is, that where upon the face of an instrument everything is regular, and there is nothing to awaken suspicion or call for additional inquiry, then, if the evidence is defective, either by reason of the death of witnesses or by lapse of time affecting their recollection, or of other circumstances which may affect their honesty, the same presumption arises as is usually acted on in the ordinary affairs of mankind." He then goes into circumstances showing the probability that the will was duly executed, to which I need not refer, and he says (1):—"Supposing, then, that Creedon and Maguire [the two hostile witnesses] were dead, I should be unable to say that there was sufficient in the matters relied upon by the plaintiff to justify the Court in refusing to this document, regular upon its face, and upon which the signature of the testator was placed by his direction, the benefit of the principle that, in the absence of evidence to the contrary, everything should be presumed to have been rightly done." He then analyses the evidence of the hostile witnesses; he satisfies himself that they were wholly unreliable, and that their evidence must be disregarded, and finally says (2): "I treat the case as if they were dead, or had lost their reason, or from some other cause were unable to assist the Court in arriving at the truth of the transaction. That being so, I decide the case, as best I can, by the light of the other evidence before us; and acting upon that evidence, I am of opinion that there is nothing in the case to rebut the presumption of due execution."

I consider this judgment to be an authority for the proposition that it is only when witnesses (or other persons who, though not official witnesses, were present) are dead, or cannot give evidence through incapacity, or their evidence cannot be accepted on account of unreliability, that the doctrine of "omnia rite esse acta praesumuntur" can be applied. It is to be called in aid only when there is a void to be filled up. If there is really evidence, it must be acted on; that evidence, however, to be considered by the light of the will itself. For the purpose of this case, it is only necessary to say that this is so in the absence of an attestation clause; but in *Clery* v. *Barry* (3) there was an attestation clause, and, notwithstanding this, the Lord Chief

(1) At p. 169. (2) At p. 175. (3) 21 L. R. Ir. 152.

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Baron found it necessary before he applied the "omnia rite esse acta praesumuntur" doctrine to place the witnesses in the class of dead witnesses.

Before I go to the evidence which was adduced in the present case, I must deal with other cases which have been relied upon by the appellants. *Dayman* v. *Dayman* (1) was strongly pressed on us by Mr. Denning in his able argument, but I confess that I can get no light whatever from the judgment in that case. I can find no principle laid down which makes it applicable as an authority. It was just a decision on facts peculiar to the case itself—nothing more. The facts were special. In the first place, it was a suit to recall a probate which had lain unquestioned for at least six years—a weighty circumstance in the way of a party trying to have the will condemned. The will was originally proved on the affidavit of one of the attesting witnesses, who swore to due execution—an affidavit which emanated from himself, and not one of these cut-and-dry affidavits which are sometimes put before deponents. This witness afterwards swore that it was false. The other witness to the will also gave evidence against due execution. He was also discredited. Both witnesses were, in fact, placed in the same position as the witnesses in *Clery* v. *Barry* (2). But further, the will was drafted and its execution superintended by a Dr. Carter (who had died), who, owing to circumstances, had experience in the execution of wills, and there was the additional element that there was on the back of the will a full attestation clause. This was not in its proper place, and the witnesses' names were not in connexion with it; but the important feature of the judgment is that the learned Judge seems to have treated the will as one with a regular attestation clause. He treated the will as regular in every respect, and containing internal evidence of due execution. I think myself that the attestation clause on the back of the will was only a contemporaneous memorandum or record of the transaction, placed on it by Dr. Carter immediately after execution, in whose handwriting it was; but, even regarding it as such, it was a weighty piece of evidence, and bound to have effect. *Dayman* v. *Dayman* (1) does not govern this case.

Owen v. *Williams* (3) was also cited. In that case a will without an attestation clause was admitted to probate, notwithstanding that the two witnesses swore against due execution. But the case has no bearing whatever on the doctrine of presumption, because a third party, who happened to be present at the execution of the will, proved that the formalities were complied with. The will was admitted to probate on direct evidence, and not on presumption. Cases nearer the point are *Gwillim* v. *Gwillim* (4) and *Cooper* v. *Bockett* (5). In each of these cases the only issue was whether the witnesses signed before or after

(1) 71 L. T. 699.
(2) 21 L. R. Ir. 152.
(3) 4 Sw. & T. 202.
(4) 3 Sw. & T. 200.
(5) 4 Moo. P. C. C. 419.

the testator. In neither was there an attestation clause. In both cases the witnesses were alive, but proved unreliable. In both, the wills were presumed to have been duly executed; but here again the witnesses were really treated as non-existent—their evidence was rejected. There is this further to be observed: when the only issue is whether the testator signed before the witnesses, the regular order of the signatures is itself evidence of the proper sequence of events and affords evidence, while the signatures of witnesses without an attestation clause give no indication of their joint presence at the moment of execution by the testator.

On the assumption, then, that a will without an attestation clause in a case where the witnesses are alive does not of itself raise any presumption of due execution, I approach the trial in this case. The plaintiffs, as they were bound to do, produced the two witnesses—both, no doubt, in a humble rank, that of domestic service, but no less respectable for that reason. One of them could not say whether she and the other witness were present when the testatrix signed the will. The other swore that they were not, and gave a description of what happened. Now, if this evidence is credible, presumption is out of the question, for otherwise a presumption, which could not be raised until the witnesses gave evidence, would be raisable after proof that the facts to be presumed did not exist. The Chief Justice on the evidence directed the jury to find against the will. It is now contended that he ought to have left the issue to the jury, on the ground that the credibility of the witnesses was for them to decide. That would be so if there was any ground for impeaching their credibility, but there was none whatever. The witness Elizabeth Rowntree's evidence was impeached because she met the defendant by appointment at a Northern Railway station and was interviewed by him. I cannot see how that affects her character as a witness, or the character of the defendant. It was his business to get information. Then it is said that she hid herself away in the north of Ireland. There was no justification for this attack on her. The girl was out of employment, and she went to Belfast to look for a situation there. Then, again, she was interviewed by a detective on the part of the plaintiffs, and, although he was a detective, he has really said nothing against her. She informed him of the exact point on which she was to give evidence, which, I think, was very honest and fair; but suggestions were made that this showed that she was primed by some one to swear in a particular way. There was nothing to warrant any such suggestion. Again, there was evidence of a conversation over the telephone between the other witness, Anne Lloyd, and the plaintiffs' solicitor, who deposed that she said something inconsistent with her evidence at the trial; but little attention is to be paid to telephone conversations. Nothing whatever occurred to justify an impeachment of her credibility. There was nothing in her evidence which contradicted anything

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that appeared in the testamentary document. There would have been a contradiction if it contained an attestation clause. There was, no doubt, an attestation clause on the back; but the inference I draw—as I have already said—is that it was disregarded; and it is very significant that the witnesses' names are not opposite the word "witnesses," but each witness's name is opposite the word "witness"—the word being written twice—which suggests that the signing by each witness was a separate act, and that the signing of the two names was not a joint operation. The will is not merely consistent with the oral evidence; it rather supports it. The evidence was, in fact, all one way; and I think that the learned Chief Justice was right in directing the jury to find that the will was not duly executed. If he had left it to the jury without direction, and they found that the will was duly executed, the finding could not stand.

It is further to be borne in mind that even if the direction of the Chief Justice was technically wrong in law, we would have to consider whether any injustice was done; and, finding as I do, that no other verdict than that given would have been right, I am of opinion that the application for a new trial should be refused.

RONAN L.J.*:—

In this case I have the misfortune to differ from my colleagues. As a general rule, in a new trial motion, when a new trial is directed, the Court is extremely anxious to say nothing that might affect the jury in the second trial; but when a new trial is refused, there is no such obligation on a Judge.

If I had to decide this case on the materials before us, I would not only say that it was a case that ought to go to the jury, but I should find, both from the facts and on the law, that there was a presumption that the will was duly executed. The Master of the Rolls and O'Connor L.J., as I understand them, limit the presumption of due execution to a case where the witnesses to the will are dead. Let us examine this proposition as a matter of common sense. Let us suppose that the witnesses in this case were dead. Is there any presumption? Yes. What does that mean? It means that the documents in the case afford prima facie evidence of the due execution of the will. Does the fact that the witnesses are alive prevent the inference from being drawn? It seems to me to be common sense that if the inference of due execution may be drawn where the witnesses are dead, it may also be drawn where they are alive, unless and until it is rebutted.

In *Clery* v. *Barry* (1), Warren J., at p. 155, says: "In dealing with cases in which the presumption is opposed to testimony, it is the duty of the Court, as was observed in *Cooper* v. *Bockett* (2), not to allow undue weight to the circumstances

* This judgment has not been revised by Ronan L.J.

(1) 21 L. R. Ir. 152.

(2) 4 Moo. P. C. C. 419.

on which the presumption is founded, on the one hand; and, on the other, not to lose sight of them. And the Court must not forget that the burden of proving due execution, whether by presumption or by positive evidence, rests on the defendant." Is the proposition that, unless the witnesses are dead, there must be positive evidence of execution? Mr. Fetherstonhaugh's sole argument was that the presumption could only arise where there was a complete attestation clause, because otherwise a party could not rely on the will without calling the witnesses. He forgot that there is an overriding rule of law that where a document is required to be attested, the attesting witnesses must be called. In *Clery* v. *Barry* (1), Warren J. says: "A presumption sufficient to establish a will arises when the attesting witnesses are dead, or are quite oblivious of the facts of execution, or are discredited by the Court when they give testimony that the will was not duly executed." In that case the witnesses, who were disbelieved by the Court, were in the same position as if they were dead; and the same presumption arises. In dealing with *Clery* v. *Barry* (1) my colleagues entirely overlooked the fact that in that case there was no jury, and that it was the Judge himself who decided on the credibility of the witnesses. The first and, to my mind, the most important question in this case is whether a Judge trying a case with a jury is justified in telling the jury that they must accept the evidence of certain witnesses. I put that question to Mr. Fetherstonhaugh, and I said: "Do not answer it unless you like," and he elected not to deal with it. He said there is no presumption except where there is a complete attestation clause. I asked: "What about an imperfect attestation clause?" and he preferred also not to deal with that question. In *Clarke* v. *Clarke* (2) the will simply contained at the end the words, "Signed in the presence of," followed by the names of two persons who signed their mark. The word "witness" or "witnesses" is not mentioned.' Surely the words "witness—Anne Lloyd," "witness—Elizabeth Rowntree," are as good as "In the presence of."

With great respect, we have an attestation clause in this case. The Master of the Rolls says there is nothing to show that this lady knew that it was necessary that the two witnesses should be present when she signed. Mr. Creswell in his evidence states: "I said to her, 'By the way, Mrs. Sinclair, have you made your will?' She said, 'I did,' and I said, 'I hope you have made it properly, as a well-known city merchant, who was a client of mine for some years, had frequently told me that he had made his will, and on his death I found his will in his safe, and there was only one witness.' And she said, 'I had two witnesses. I did it on one of those printed forms which contained full instructions.'" There are fourteen clauses in the printed form. The Master of the Rolls suggests that it directs that the attestation clause should be used. It does not. It says that on the other

(1) 21 L. R. Ir., at p. 154. (2) 5 L. R. Ir. 47.

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side there is a form of a complete will. Of these fourteen clauses, the only one relating to the preparation of a will is the one, I think, numbered 5, which says that the testator must sign his name at the foot or end of the will in the presence of two witnesses, at least, present at the same time. Are we to take it that she stopped in the middle of the sentence and did not notice the words, "present at the same time," and ignored them? The clause further said that the witnesses should subscribe the will in the presence of the testator and of each other. The direction is that the testator and witnesses must put their signatures at the foot of the will, and at the foot of the will the signatures are to be found.

What is the value of an attestation clause? The value of it is that it shows that the will was prepared by a person who knew what was necessary. No one imagines that when two domestic servants signed this will they read the attestation clause. There is nothing inconsistent in the document with the testatrix having signed the will in the presence of the two witnesses. What about the presumption of due execution? What was the presumption in *Clarke* v. *Clarke* (1), to which we have been referred? Deasy L.J. says (2): "I have no doubt that the deceased intended by this will to give his widow the property which she says he, in his last illness, stated he had given her." Has anybody any doubt that this lady intended to make these dispositions? The Lord Justice adds (3): "He knew everything that was necessary to constitute a good testamentary disposition." Mrs. Sinclair knew, if she read the instructions from which she said she got her information, that she must have two witnesses. In *Clery* v. *Barry* (4), Warren J. says that in the circumstances existing there the presumption of an execution was of an unsubstantial character; and he says the evidence of the witnesses was not satisfactory, but that it was sufficient to answer the weak and unsubstantial presumption which arises under the extraordinary circumstances of the case (5). His decision was, however, reversed by the Court of Appeal. Palles C.B., at p. 166, observes: "The presumption does not arise from the signature being in the testator's handwriting. It is merely one of the instances of the application of the doctrine, 'omnia rite esse acta praesumuntur.' The principle is that where upon the face of an instrument everything is regular, and there is nothing to awaken suspicion or call for additional inquiry, then, if the evidence is defective, either by reason of the death of the witnesses or of lapse of time affecting their recollection, or of other circumstances which may affect their honesty, the same presumption arises as is usually acted on in the ordinary affairs of mankind." Everything is perfectly regular upon the face of the document in this case, and there is nothing to awaken suspicion. At p. 170 Palles C.B. says:

(1) 5 L. R. Ir. 47.
(2) At p. 55.
(3) At p. 55.
(4) 21 L. R. Ir. 152.
(5) At p. 159.

"No one can attach greater importance than I do to the demeanour of a witness, and to the view that is taken by the Judge at the trial as to the credibility of his testimony; but it would be a dangerous doctrine, and one that I am unable to countenance, that the Court of Appeal, although under the disadvantage of not seeing the demeanour of the witnesses, is not bound to apply its experience and knowledge of affairs as best it can to every material circumstance in the case, including the credit of a witness. Of course we should give due weight to the conclusion of the learned Judge, who saw his demeanour was favourable to his credibility. That, however, is but one element, although a very potent one, in our consideration of his credit; and I cannot hold that we are concluded by it; but, in my opinion, we are bound to form as best we can our own opinion upon the credit to be attached to the evidence of each witness."

One principle firmly established in our law is that the credit to be attached to the evidence of witnesses is a question for the jury and not for the Judge; but, it being a question for the Judge in *Clery* v. *Barry* (1), where the trial took place without a jury, Palles C.B. says (2): "I treat the case as if they [the witnesses] were dead, or had lost their reason, or from some other cause were unable to assist the Court in arriving at the truth of the transaction. That being so, I decide the case, as best I can, by the light of the other evidence before us; and acting upon that evidence, I am of opinion that there is nothing in the case to rebut the presumption of due execution." The evidence of the parties does not affect the existence of the presumption, but it may rebut the presumption. The presumption exists where the witnesses are dead, and also where there is a complete attestation clause.

Giving the result of his conversations with Miss Lloyd on the telephone, Mr. Creswell said, in reply to Mr. Lynch: "I told her I wanted her to swear an affidavit as to the execution of the will, and she said she didn't like signing documents of any kind, but that Mrs. Sinclair signed the will all right in her presence and in the presence of Elizabeth Rowntree." That is a perfectly clear and unequivocal statement. Anne Lloyd was not asked to deny that she had made that statement. That is not evidence of due execution; but it is evidence to go to the credit of this woman as to what she had said—namely, that at one time she and the other witness were both present. Let us assume that the evidence of the other woman was to the same effect; that she did not prove the will, or that she did not know what happened. Suppose it were common case that the two witnesses remembered nothing whatever about the will, and that the will appeared to be all right, what would happen? It is said it cannot stand because there is no presumption. The presumption which exists where the witnesses are dead is equally effective where the witnesses are alive and the Court refuses to act on their evidence.

(1) 21 L. R. Ir. 152. (2) At p. 175.

Appeal. (*I. F. S.*) 1924. ROLLESTON *v.* SINCLAIR. Ronan L.J.

Both Warren J. and Palles C.B. put untrustworthy witnesses in the same position as witnesses who are dead. If the witnesses are alive and come forward, and the Court comes to the conclusion that their evidence is untrustworthy, the presumption must prevail.

All the facts are strongly in favour of the presumption in this case. The testatrix acted on the directions contained in the printed form, which did not say that she should have an attestation clause, but simply directed that the signatures should be at the foot of the will. It is a clear and well-drawn will. The testatrix was a lady of exceptional ability, as the evidence and documents show. From the evidence the inference is irresistible that when she read the directions she took very good care to have two witnesses present; and not only do I think there was evidence on which a jury would be justified in finding for the will, but I myself should have come to that conclusion. On the best view I can form there is an overwhelming presumption in favour of due execution, a presumption far stronger than that in any of the cases I have come across. The presumption exists in the case of a regularly executed document where the witnesses are dead, and where they are alive it may be rebutted by actual evidence to the contrary; but the evidence to the contrary in this case is not sufficient to rebut the presumption.

O'CONNOR L.J.:—

I agree in the conclusion arrived at by the Master of the Rolls. I desire to give my own reasons for so doing.

The burden of proof frequently shifts from one side to another in the course of a case. Facts which require explanation may be adequately explained; presumptions may disappear by the way; in the ultimate result the question is—is there any real evidence to go to a jury upon the issue in dispute? For example, a plaintiff in a libel action may prove the libel; the defendant may satisfy the jury that the occasion is a privileged one; the circumstances may negative the malice which the publication of defamatory matter suggests; finally, it may be the duty of the Judge to direct upon the issue of malice. So, also, I imagine that the presumption arising from the doctrine, "res ipsa loquitur," may be completely displaced by evidence of a cogent and overwhelming character.

In the present case, how did the testimony stand at the conclusion of the case? Such actual evidence as there was negatived the due execution of the will. The evidence was that of a witness whose recollection was clear and positive, who had never made any previous inconsistent statements, and against whose character there was no shadow of imputation. In the circumstances I think the learned Chief Justice was right in withdrawing the case from the jury.

Solicitor for the plaintiffs: *J. R. Creswell.*
Solicitors for the defendant: *Lett & Fetherstonhaugh.*

C. L.

MICHAEL DEMPSEY *v.* MARY JANE TRACY (1).
(1924. No. 4026.)

Appeal.
(*I. F. S.*)
1924.
June 12.
July 3.

Landlord and tenant—Lease—Term "from" particular date—Commencement of term — Notice to quit — Correct date for expiration — Writ specially indorsed—Motion for final judgment—Verification of cause of action.

By an agreement in writing, dated the 1st August, 1920, the defendant agreed to become tenant to K. Brothers of certain premises for three years, and as yearly tenant thereafter, "from the 1st day of September, 1920," at the annual rent of £60 sterling, payable by quarterly payments, the first to be made on the 1st day of December, 1920. And the agreement further provided: "Three months' notice in writing on either side previous to the expiration of the third or any subsequent year to terminate this tenancy." K. Brothers assigned their interest in the premises to the plaintiff on 2nd November, 1922. Plaintiff, on the 1st June, 1923, served the defendant with a notice to quit, requiring her to deliver up possession on the 1st September, 1923. Defendant not having quitted the premises, plaintiff issued a specially indorsed writ, claiming possession.

Held by the Supreme Court (Kennedy C.J., O'Connor and FitzGibbon JJ.), affirming the decision of Molony L.C.J., that the notice to quit was good, as the 1st day of September, 1923, was a correct date for the expiration of the notice, and accordingly the plaintiff was entitled to final judgment for possession.

Per Kennedy C.J. (FitzGibbon J. concurring): The first day of the term was not the 1st day of September, 1920, but the term commenced immediately on the expiry of that day.

Sidebotham v. *Holland*, [1895] 1 Q.B. 378, followed by O'Connor J.

Plaintiff's affidavit in support of the motion for final judgment stated that K. Brothers assigned their interest in the premises to him, and that he had received rent from the defendant up to the date of the service of the notice to quit. Defendant's affidavit resisting the motion admitted paying rent to the plaintiff, and did not question the validity of the assignment from K. Brothers to the plaintiff. Objection having been taken on behalf of the defendant that the plaintiff only alleged, but had not proved, the assignment:

Held, that the plaintiff's affidavit was sufficient.

Bruen v. *Ashmore*, 2 N. Ir. J. R. 4, distinguished.

APPEAL by defendant from an order made on the 2nd May, 1924, by the Lord Chief Justice of Ireland, sitting for the King's Bench Divisional Court, giving the plaintiff leave to sign final judgment for possession of the shop, No. 16 Upper George's Street, Dun Laoghaire (formerly known as Kingstown), County Dublin.

The plaintiff's writ was specially indorsed as follows:— "The plaintiff is entitled to the possession of All That the lock-up Shop No. 16 Upper George's Street, Kingstown (now Dun Laoghaire), in the Barony of Rathdown and County of Dublin, which said premises were, by agreement in writing dated 1st August, 1920, let by Messrs. Kelly Brothers, Ltd., to the defendant for a term of three years from the 1st September, 1920, which said tenancy was duly determined by notice to quit,

(1) In the Supreme Court, before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

Appeal. (*I. F. S.*) 1924.

DEMPSEY *v.* TRACY.

expiring on the 1st September, 1923, pursuant to the condition in said agreement contained. On the 2nd day of November, 1922, the said Messrs. Kelly Brothers, Ltd., assigned their interest in the said premises to the plaintiff. Notice whereof was duly given to the defendant. The plaintiff claims possession of the said premises."

The agreement between the parties referred to was as follows:—

MEMORANDUM OF AGREEMENT.

To Messrs. Kelly Brothers, Ltd., Kingstown.

I hereby agree to become tenant to you for the lock-up shop, No. 16 Upper George's Street, Kingstown, Co. Dublin, for three years, and as yearly tenant thereafter from the 1st day of September, 1920, at the annual rent of £60 sterling, payable by equal quarterly payments of £15 sterling, the first to be made on the 1st day of December, 1920. Said rent to include all rates and taxes. I agree not to sub-let or assign said shop or any part thereof without your permission in writing. Three months' notice in writing on either side previous to the expiration of the third or any subsequent year to terminate this tenancy. You are to keep the roof of said premises in good and tenantable repair during my tenancy. I agree to give up the said shop in same good order and condition in which I received same, fair wear and tear and damage by fire or storm only excepted.

Dated this 1st day of August, 1920.

(Signed) MARY JANE TRACY.
Witness—P. J. DIXON.

I accept the above tenancy.—CATHERINE KELLY, for Kelly Bros., Ltd.
Witness—P. J. DIXON.

On the 1st June, 1923, the defendant was served with the following notice to quit:—

Take notice that I do hereby require you to deliver up to me or to my attorney thereto lawfully authorised, on the 1st day of September next ensuing the date hereof, the quiet and peaceable possession of all that the lock-up shop, No. 16 Upper George's Street, Dun Laoghaire, in the County of Dublin, now in your possession as yearly tenant, subject to three months' notice to quit; and take notice that in case you shall refuse or neglect to deliver up to me, or to my said attorney lawfully authorised, the quiet and peaceable possession of the said premises, on said 1st day of September next, I will sue you for double the rent of said premises, and for all costs and expenses attending such proceedings, pursuant to the statute in such case made and provided, or take such other proceedings as I may be advised.

Witness my hand this 1st day of June, in the year of our Lord one thousand nine hundred and twenty-three.

MICHAEL DEMPSEY.

To Mary Jane Tracy,
16 Upper George's Street, Dun Laoghaire.

The defendant filed a statement of defence, but the plaintiff moved for final judgment. The plaintiff's affidavit in support of the motion, having set out the particulars of the agreement of 1st August, 1920, made between Messrs. Kelly Brothers and the defendant, continued as follows:—"On the 2nd day of November, 1922, the said Messrs. Kelly Brothers assigned their interest in the said premises to me, and I received rent from the

defendant up to the date of the service of the notice to quit." The affidavit then referred to the notice to quit, and an exhibit was made of it. Defendant, in an affidavit resisting the motion, averred that up to the date of the service on her of the notice to quit no rent was due to the plaintiff; that after the service of such notice to quit the plaintiff absolutely refused to accept any further rent from her, stating that he required possession of the premises unless she was willing to pay an increased rent of £120; that she offered an increased rent of £80, but the plaintiff refused to accept it; and that she had made many alterations and improvements in the premises, in which she carried on her business; and that she was advised she had a good defence to the action both at law and on the merits.

The Lord Chief Justice of Ireland (the Right Hon. T. F. Molony) granted leave to sign final judgment, and from this order the defendant appealed.

Bartley, for the defendant and appellant:—

The notice to quit is bad. It should have been served for the 2nd September, and not the 1st September. The letting is "from" the 1st day of September. The 2nd day of September is the first day of the term: *Meggeson* v. *Groves* (1); *Sidebotham* v. *Holland* (2); *Page* v. *More* (3); *Ackland* v. *Lutley* (4). Secondly, the plaintiff has not verified his cause of action. He alleges an assignment, but has not proved it. If the cause of action be not verified, the Court has no jurisdiction to grant the motion for final judgment: *Bruen* v. *Ashmore* (5). Thirdly, even if the Court have jurisdiction, it ought not to exercise it on a motion for final judgment where the action involves a difficult question of law.

Martin Maguire, for the plaintiff and respondent:—

The cause of action is verified: *May* v. *Chidley* (6). The tenant has paid rent, and in law there is an estoppel. The point raised as to the notice to quit is ruled by authority: *Sidebotham* v. *Holland* (2) and *Skelly* v. *Thompson* (7).

[Other authorities cited and discussed: — *Queen's Club Gardens Estates, Ltd.*, v. *Bignell* (8); *Harvey* v. *Copeland* (9); Finlay's Law of Landlord and Tenant in Ireland, 2nd ed., p. 353; Furlong's Law of Landlord and Tenant in Ireland, 2nd ed., p. 609; Woodfall on Landlord and Tenant, 21st ed., pp. 187 and 444.]

Cur. adv. vult.

July 3.

KENNEDY C.J.:—

By an agreement in writing dated the 1st of August, 1920, made by way of proposal and acceptance, the defendant, Mary

(1) [1917] 1 Ch. 158.
(2) [1895] 1 Q. B. 378.
(3) 15 Q. B. 684.
(4) 9 Ad. & El. 879.
(5) 2 N. Ir. J. R. 4.
(6) [1894] 1 Q. B. 451.
(7) 45 Ir. L. T. R. 138.
(8) [1924] 1 K. B. 117.
(9) 30 L. R. Ir. 412.

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Jane Tracy, agreed to become tenant to Messrs. Kelly Bros., Ltd., Kingstown, "for the lock-up shop, No. 16 Upper George's Street, Kingstown, in the County of Dublin, for three years, and as yearly tenant thereafter from the 1st day of September, 1920, at the annual rent of £60 sterling, payable by equal quarterly payments of £15 sterling, the first payment to be made on the 1st day of December, 1920." The agreement contained the following provision as to determining the tenancy: "Three months' notice in writing on either side previous to the expiration of the third or any subsequent year to terminate this tenancy."

It appears that on the 2nd November, 1922, Messrs. Kelly Brothers, Ltd., assigned their interest in the premises to the plaintiff, Michael Dempsey. It was admitted that the defendant paid rent to the plaintiff prior to the service of the notice to quit.

Dempsey, on the 1st of June, 1923, served on the defendant a notice to quit bearing that date, whereby he required her to deliver up possession of the said premises "on the 1st day of September next ensuing the date hereof." The defendant did not comply with the notice to quit; and on the 8th March, 1924, the plaintiff issued his specially indorsed writ claiming possession of the said premises. On the 2nd May, 1924, an order was made by the Lord Chief Justice, sitting for the King's Bench Divisional Court of the late High Court of Justice, giving the plaintiff liberty to sign final judgment in the action for recovery of possession of the said premises. The present appeal is taken by the defendant from that order.

Mr. John Bartley, for the defendant, rests his appeal on two grounds. In the first place, he says that the notice to quit served was bad, and has not determined the tenancy. In the second place, he says the plaintiff's affidavit grounding the motion for judgment does not verify the cause of action as required by the rules of the Supreme Court. He throws out the further contention that the action involves a difficult question of law, not fit to be disposed of on a motion for summary judgment.

Mr. Bartley's learned and subtle argument upon the notice to quit begins at the very beginning, for his first proposition is that, inasmuch as the tenancy is expressed in the agreement to commence "from the 1st day of September, 1920," and not "on the 1st day of September, 1920," the 1st day of September is excluded from, and the 2nd day of September would be the first day of, the term, which commenced at midnight of the 1st–2nd September.

I am not prepared to lay down that the word "from" has in this connexion a fixed meaning. I am sure that it is used quite loosely in colloquial English; at any rate as we speak it in this country. I have no doubt that the ordinary non-legal person would usually intend quite the same thing if he said that he had taken a house "for a month from the 1st of June" as if he said

that he had taken the house "for the month of June." In either case he would suppose himself to be entitled to go into possession of the house at any time on the first day of that calendar month, and he would expect to render himself liable to further rent if he were found still in occupation on the 1st day of July. Very many, probably the majority, of short term tenancy agreements are cast in the language of ordinary speech, and must be so read in order to find the true intention of the parties. In that sense I concur in the dictum of Lord Lindley that "'at,' 'on,' 'from,' and 'on and from' are for this purpose equivalent expressions": *Sidebotham* v. *Holland* (1). On the other hand, in a technically and precisely drawn instrument, whose language was the formal draftsmanship of the conveyancer, one would naturally and primarily give to the word "from" its precise literal meaning. So, one finds that in the very exact language of the learned editors of Key and Elphinstone's Precedents a leasehold term is made to commence "from" a particular day, meaning from the expiry of that day. Similarly, in the Encyclopædia of Forms and Precedents. The learned editors of the latter work have a useful, and on the whole sound, note on this question in their prefatory note to the subject of Landlord and Tenant, vol. vii, p. 81.

The tenancy agreement in the present case is not a highly technical document. It is a proposal by Mr. Bartley's client, in the language of ordinary speech, to become tenant to Kelly Bros., Ltd., who accepted the proposal, from the 1st day of September, 1920. I read the document as a whole to see whether there is anything that fixes the meaning of the word "from" in the intention of the parties. Mr. Bartley contends that rent may—as of course it may—be made payable at any time by agreement. But it supports Mr. Bartley's contention to look at the clause providing for payment of rent. The rent is not made payable in advance. It is to be paid quarterly, the first payment to be made on the 1st day of December, 1920. If the 1st day of September, 1920, be included in the term, the final payment of rent would be posterior to the lease. One cannot doubt that the quarterly rent days are the final days of the quarters: *Ackland* v. *Lutley* (2). I am satisfied that, on the true construction of this particular agreement, the 1st day of September, 1920, was not the first day of the term, but that the term commenced immediately upon the expiry of that day. Mr. Bartley's first proposition therefore prevails. Accepting, then, Mr. Bartley's contention that the 2nd September, 1920, was the first day of the term, Mr. Bartley argues that the notice to quit given for the 1st day of September was bad.

I confess that I find this portion of Mr. Bartley's argument difficult to follow, in view of the authorities. I find a consensus of opinion and recognised authority that a notice to quit given

(1) [1895] 1 Q.B. 378, at p. 384.
(2) 9 Ad. & El. 879, per Lord Denman C.J., at p. 894.

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for the last day of the term is unquestionably good. The doubt of A. L. Smith L.J. in *Sidebotham* v. *Holland* (1) was not as to the validity of such a notice, but as to the validity of a notice to quit given for the day after the last day of the term; such a notice as Mr. Bartley says ought to have been served in the present case. A notice to quit contains two elements, namely, notice and demand of possession. The notice, in such a case as the present, and in cases similar to those cited, should expire simultaneously with the expiry of the term, that is to say, at midnight of the last day of the term. Thereupon the reversioner is entitled to possession. It seems to me that the fallacy in Mr. Bartley's argument is that he segregates the demand of possession, and construes it as requiring delivery of possession at some time during the currency of the last day of the term (which would be wrong), instead of attributing it to the expiry of the notice, that is to say, to the expiry of the last day of the term. In my opinion, this question is now closed against Mr. Bartley, and we cannot reopen it, going back, as he would have us do, to start like pioneers from the early discussions as to what constitutes a reasonable notice to quit.

Mr. Bartley's second contention is that the plaintiff's affidavit grounding the motion for judgment is insufficient under the rules of Court, because it does not verify the cause of action, for which purpose, he says, that the affidavit should prove the alleged assignment of the 2nd November, 1922. He relies on *Bruen* v. *Ashmore* (2). Now, it is to be observed that Mr. Bartley has not taken any objection to the indorsement on the writ; and I do not wish to be taken as deciding that the averment there as to the alleged assignment is sufficient. For this purpose I take the indorsement, which has not been objected to, as good and sufficient. The rules of Court only require that the cause of action be verified. That may be done in general terms. The rules do not require a detailed verification of the particulars: *May* v. *Chidley* (3). The report of *Bruen* v. *Ashmore* (2) is not quite satisfactory. The cause of action certainly included an assigned chose in action, and the claim does not appear to have shown a complete assignment. In the present case, not only is it admitted that the defendant paid rent to the plaintiff, but she has filed an affidavit to the effect that she pressed him to accept a larger rent. The alleged assignment is not questioned. It is treated by the defendant as good. This contention, therefore, also fails.

Finally, Mr. Bartley says that the validity of the notice to quit involves a difficult question of law, which should not be disposed of on motion for final judgment. It is true that Mr. Bartley decked it out with his best resources of ingenuity and learning; but, in the view I have taken, the question in this particular case is simple, and covered by established authority.

In my opinion, therefore, this appeal fails, and should be dismissed with costs.

(1) [1895] 1 Q.B. 378. (2) 2 N. Ir. Jur. R. 4. (3) [1894] 1 Q.B. 451.

O'CONNOR J.:—

I will assume, when dealing with Mr. Bartley's principal ground of defence, that the tenancy commenced at midnight—the intervening point of time between the first and second days of September—and that the first day of the term for which the premises were let was the 2nd September. This is his contention, based on the written document which creates the tenancy "from the 1st September," construing the word "from" in its strictest technical meaning. But, this being so, the last day of each year of the tenancy was the 1st September; and I think that it is well established that a notice to quit served in sufficient time for the last day of the year is a valid notice. *Sidebotham* v. *Holland* (1) is an authority which cannot be disregarded. It was the judgment of the Court of Appeal in England, consisting of Lord Halsbury, Lindley L.J., and Smith L.J.; and although on the question there at issue Smith L.J., while not dissenting from the judgment, expressed a personal opinion at variance with his colleagues, yet on the question at issue in the present case he was in complete concurrence with the other members of the Court. In *Sidebotham* v. *Holland* (1) the tenancy was held to commence on the 19th May, that being the first day of the tenancy. A notice to quit was served for the 19th May, and the tenant's contention was that it ought to have been served for the 18th May, the last day of the year, because on the 19th May he entered on a new year of the tenancy. This objection was held to be bad, Lindley L.J. saying: "I have looked at all the decisions which were referred to in the argument, and at many more, and I can find none in which it has been held that a half-year's notice to quit on the anniversary of the day on which the tenancy commenced is bad. I should be very much surprised to find such a case" (2). No doubt this proposition does not cover Mr. Bartley's objection, because he says that the first day of his tenancy was the 2nd September, as the term commenced, not on the 1st September, but from the 1st September. He therefore says the notice to quit should expire on the 2nd September, the anniversary. Now, it is clear that although there was not unanimity of opinion on the question whether service of a notice to quit for the anniversary of the commencement of the term was good, there was complete unanimity in holding that a notice for the last day of the year—in that case the 18th May—would have been good. Lindley L.J. says, at p. 383: "One year from that day" [meaning the 19th], "but including that day, would expire at midnight on the 18th of the next May: *Reg.* v. *St. Mary, Warwick* (3); *Ackland* v. *Lutley* (4). If, therefore, notice to quit on the 18th were given, it would, no doubt, be good." In this Smith L.J. concurred.

(1) [1895] 1 Q. B. 378.
(2) [1895] 1 Q. B., at p. 383.
(3) 1 E. & B. 816.
(4) 9 Ad. & El. 879.

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This exactly covers the present case on the assumption that the 2nd September was the first day of the tenancy, because then the 1st day of September would be the last day of each year of the tenancy. It was for this day that the notice was served. I am of opinion that it was valid. This completely disposes of Mr. Bartley's point; but I must not be understood as assenting to the proposition that a tenancy from a particular day must necessarily be held to exclude that day and to commence at earliest on the midnight of that day. On this Lindley L.J. makes some important observations. At p. 384 he says: "When considering the validity of a notice to quit given in time and expiring on the anniversary of the commencement of a tenancy, I can find no distinction ever drawn between tenancies commencing 'at' a particular time or 'on' a particular day and 'from' the same day. 'At,' 'on,' 'from,' and 'on and from' are for this purpose equivalent expressions. Any distinction between them for such a purpose as this is far too subtle for practical use."

I must say for myself that I think nine people out of ten who would take a house for one year from the 1st May would think that they were entitled to get possession on the 1st May, and would be bound to give up possession on the following 1st May, and not entitled to hold possession until midnight. It makes no difference whether the agreement is verbal or written; but of course an agreement could be so particularly framed as to make the tenancy commence at any point of time. The able argument of Mr. Bartley is only one more instance of the technicalities in which the law of notices to quit has been involved, and it is a curious thing that this branch of the law, which had its origin in a desire to do what was reasonable and fair as between landlord and tenant, has given such ample scope for unmeritorious defences.

I agree with the Chief Justice that the cause of action was sufficiently verified.

FITZGIBBON J.:—

This is an appeal by the defendant from an order of the late King's Bench Division of the High Court of Justice, dated the 2nd of May, 1924, whereby liberty was given to the plaintiff to sign final judgment for possession of the lands and premises mentioned in the writ of summons, and for the costs of the suit, with a stay of execution for one month from the date of the order.

The tenancy of the defendant was created by a memorandum of agreement dated August 1st, 1920, whereby the defendant agreed to become tenant to Kelly Brothers, Ltd., of the shop, No. 16 Upper George's Street, Kingstown, for three years, and as yearly tenant thereafter, from the 1st day of September, 1920, at the annual rent of £60, payable by equal quarterly payments,

the first payment to be made upon the 1st day of December, 1920. The agreement contained, in addition to clauses dealing with subletting and repairs, this condition: "Three months' notice in writing on either side previous to the expiration of the third or any subsequent year to terminate this tenancy."

The writ of summons, which is specially indorsed, alleges an assignment dated November 2, 1922, from Kelly Brothers, Ltd., to the plaintiff, and is founded upon a notice to quit expiring on the 1st of September, 1923.

Two points have been made upon behalf of the defendant in opposition to the plaintiff's application for final judgment: first, that the notice to quit was invalid, in that it expired on the 1st of September instead of upon the 2nd of September, which Mr. Bartley contended was the correct date; and secondly, that the plaintiff's affidavit did not verify the cause of action.

Mr. Bartley contends that as the tenancy was for a term to run "from the 1st day of September," the 1st day of September was not included in the term, and that the tenancy therefore commenced upon the 2nd day of September. If that be so, he says, the notice to quit should have been for the 2nd of September, because by quitting on the 1st of September at any time before midnight on the night of September 1–2 the tenant would lose a portion of the period for which he paid rent; and he relied upon *Page* v. *More* (1) and *Sidebotham* v. *Holland* (2). As to the date upon which the tenancy in the present case commenced, I respectfully concur in the judgment of the Chief Justice, and the reasoning upon which it is founded. Assuming that the tenancy in the present case did commence upon September 2, upon what date should the notice to quit expire? The law is stated by Mr. Cole (3) as follows: "Generally speaking, a notice to quit should expire on the *last day* of some year of the tenancy, and not on the same day on which the tenancy commenced: *Poole* v. *Warren* (4). Thus, upon a tenancy *from* Lady Day, the notice should expire on Lady Day, and not on the 26th of March. A lease for years *from* the 25th of March excludes that day, and does not expire until the last minute (12 o'clock p.m.) of the 25th day of March in the last year of the term: *Ackland* v. *Lutley* (5)." Substitute "September 1" for "Lady Day" and for "the 25th March" in the passage cited, and it applies exactly to the present case, and shows that the notice to quit with which we have to deal was framed in accordance with the law as stated by Mr. Cole. In *Sidebotham* v. *Holland* (2), upon which Mr. Bartley relies, a tenancy commenced upon May 19, and the question was whether a notice to quit on May 19 was a good notice. The Court (Halsbury C. and Lindley L.J., *dubitante* A. L. Smith L.J.) held that it was. We are not concerned to consider whether the doubts were well-founded; but the whole Court was quite unanimous

(1) 15 Q. B. 684.
(2) [1895] 1 Q. B. 378.
(3) Cole on Ejectment, p. 49.
(4) 8 Ad. & El. 587, 588.
(5) 9 Ad. & El. 879.

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in holding that a notice to quit on the 18th of May would have been good. "One year from that day" [i.e. May the 19th], says Lindley L.J., "but including that day, would expire at midnight of the 18th of the next May: *Reg.* v. *St. Mary, Warwick* (1); *Ackland* v. *Lutley* (2). If, therefore, notice to quit on the 18th were given, it would no doubt be good. Indeed, it is well settled that a notice ought to expire on the last day of the current year" (3). And with this statement of the law A. L. Smith L.J. agreed (4).

The tenant upon whom such a notice is served can, if he pleases, enjoy the full extent of his term, as he is not bound to quit, and his possession is not determined until midnight of the last day of the term.

The notice to quit in *Page* v. *More* (5), though served for the proper day, was bad, because it purported to determine the tenancy at 12 noon on the last day of the term, thus depriving the tenant of his full rights under his lease.

The English text-writers (Messrs. Woodfall, Foà, and others) are all in accord with Mr. Cole upon this question; and Mr. Furlong, representing the Irish tradition, says: "A notice to quit should expire on the last day of some year of the tenancy, and not upon the day upon which the tenancy commenced" (6). "A notice to quit on the proper day, at 12 o'clock at noon, was held to be bad" (6).

Mr. Bartley's second argument is an attempt to induce the Court to follow a dictum of Lord Lindley, dissented from by A. L. Smith L.J., and, unless read with the limitations suggested by the Chief Justice, contrary to the received opinion of text-writers, in order to antedate the commencement of the tenancy in the present case for the purpose of invalidating the notice to quit. It is a sufficient answer to say that if we were prepared to hold with Lindley L.J. that the expression "from the 1st of September" included that day, the decision (7) upon which Mr. Bartley relies as supporting that construction decides also that a notice to quit on the anniversary of the day on which the tenancy commenced is good.

I prefer, however, to base my decision upon the former ground, that the tenancy in the present case commenced upon September 2, and was duly determined by a notice to quit expiring upon the last day of a year of the tenancy, and to leave the actual decision of *Sidebotham* v. *Holland* (8) open for consideration if it should ever come before this Court.

It is unnecessary to say anything about *Harvey* v. *Copeland* (9), where the question for decision was what notice, if any, was necessary to determine a weekly tenancy. In the present

(1) 1 E. & B. 816.
(2) 9 Ad. & El. 879.
(3) [1895] 1 Q. B., at p. 383.
(4) At p. 389.
(5) 15 Q. B. 684.
(6) Furlong, Landlord and Tenant, 2nd ed., p. 629.
(7) *Sidebotham* v. *Holland*, [1895] 1 Q. B., at p. 383.
(8) [1895] 1 Q. B. 378.
(9) 30 L. R. Ir. 412.

case the length of the notice to be given is defined by the lease itself, and no question of custom or reasonableness can arise.

I could add nothing to the judgment of the Chief Justice upon Mr. Bartley's second point, that the cause of action was not sufficiently verified, and I have only to express my complete agreement with it.

Solicitors for the plaintiff: *Corrigan & Corrigan.*
Solicitor for the defendant: *James Brady.*

H. J. M'C.

[NOTE.—The decision of the Court of Appeal in *Wilkins* v. *M'Ginity*, [1907] 2 I.R. 660, was not cited, in which it was held that a term "from 1st November" began on that day, and that day was the first day of the term, and the validity of a three months' notice of surrender depending thereon was considered. Nor, upon the second point, was the decision of the Court of Appeal in *Stokes* v. *Tracey*, [1920] 2 I.R. 444, referred to, where it was held that the words, "duly determined by notice to quit," in Order 3, rule 6 (F), refer to cases in which the determination of the tenancy is a "legal" consequence of the contract, and do not apply where the right to serve the notice depends on express agreement between the parties; and, accordingly, that leave to grant final judgment for possession under Order 14, rule 1, could not be granted.—A. D. B. (ED.).]

Meredith J.
(I. F. S.)
1924.

July 22.

GIEVES, LIMITED, *v.* O'CONOR.

Practice—Registering certificate of English judgment in Irish Free State—Judgments Extension Act, 1868 (31 & 32 *Vict. c.* 54), *sect.* 1—*Application to the Irish Free State — Constitution of the Irish Free State, Article* 73—*Constitution of the Irish Free State* (*Saorstát Éireann*) *Act*, 1922 (*No.* 1 *of* 1922), *Sch. I, Article* 73—*Irish Free State* (*Consequential Provisions*) *Act*, 1922 (13 *Geo.* 5, *Sess.* 2, *c.* 2), *sect.* 1—*The Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *sect.* 41, *sub-s.* 1.

The certificate of an English judgment may be registered under the Judgments Extension Act, 1868, in the Irish Free State.

Decision of the Court of Appeal in England in *Wakely* v. *Triumph Cycle Co.*, [1924]. 1 K.B. 214, not followed.

EXPARTE APPLICATION for liberty to register in the Irish Free State, pursuant to the Judgments Extension Act, 1868 (1), a judgment obtained by the plaintiffs in England. Messrs. Gieves, Limited, whose registered office is at 22 The Hard, Portsmouth, in the County of Hants, in England, naval and military outfitters, on the 22nd day of January, 1923, obtained judgment against E. H. O'Conor, of Charleville, Dunleer, County Louth, Ireland, therein stated to be of H.M.S. "Calliope," Reserve Fleet, The Nore, Chatham, in the County of Kent, in England, a lieutenant in the Royal Navy (retired), before the said District

(1) The Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), sect. 1: "Where judgment shall hereafter be obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer at Westminster or Dublin respectively, for any debt, damages, or costs, on production to the Master of the Court of Common Pleas at Dublin where such judgment shall have been obtained or entered up in any of the said Courts in England, or to the Senior Master of the Court of Common Pleas at Westminster where such judgment shall have been obtained or entered up in any of the said Courts in Ireland, of a certificate of such judgment in one of the Forms contained in the schedule hereto annexed, as the case may be, purporting to be signed by the proper officer of the Court where such judgment has been obtained or entered up, such certificate shall be registered by such Master in a Register to be kept in the Court of Common Pleas at Dublin and at Westminster respectively for that purpose, and to be called in the Court of Common Pleas at Dublin 'the Register for English Judgments,' and to be called in the Court of Common Pleas at Westminster 'the Register for Irish Judgments,' and shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered, and all the reasonable costs and charges attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment: Provided always, that no certificate of any such judg-

Registry of the said Division of the said High Court, for payment of the sum of £24 5s. 3d. on account of the price of goods sold and delivered, with the sum of £8 9s. 6d. for costs, which judgment was obtained after default after personal service. Officials in the Judgments Office declined to register the certificate of the English judgment, and the matter was referred to the Master of the King's Bench Division, and he, having given the request for the registration consideration, declined to register the certificate of the judgment on the ground that the Judgments Extension Act no longer applied.

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ment shall be registered as aforesaid more than twelve months after the date of such judgment, unless application shall have been first made to and leave obtained from the Court or a Judge of the Court in which it is sought so to register such certificate."

When the Courts mentioned in this section were altered in England by the Judicature Act, 1873 (36 & 37 Vict. c. 66), and in Ireland by the Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), and new Courts established in their stead, both Acts provided (sect. 76 of the English Act and sect. 71 of the Irish Act): "All Acts of Parliament relating to the several Courts and Judges, whose jurisdiction is hereby transferred to the High Court of Justice and the Court of Appeal respectively, or wherein any of such Courts or Judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done after the commencement of this Act, as if the High Court of Justice or the Court of Appeal and the Judges thereof respectively, as the case may be, had been named therein instead of such Courts or Judges whose jurisdiction is so transferred respectively." And the following sections in each Act provided for the transfer of the existing staff of officers to the Courts thereby established. When, in Ireland, the Courts established by the Judicature (Ireland) Act, 1877, were altered by the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), and other Courts were established instead for "Northern Ireland" and for "Southern Ireland," sect. 41, sub-s. 1, of that Act provided that "all enactments relating to the Supreme Court of Judicature in Ireland and the Judges and officers thereof shall apply to the Supreme Court of Judicature in Southern Ireland and to the Supreme Court of Judicature in Northern Ireland respectively, and the Judges and officers thereof, as they apply to the Supreme Court of Judicature in Ireland and the Judges and officers thereof, and as if for references to the High Court of Justice in Ireland there were substituted references to the High Court of Justice in Southern Ireland or the High Court of Justice in Northern Ireland, as the case may be, and as if for references to the Court of Appeal in Ireland there were substituted references to the Court of Appeal in Southern Ireland or to the Court of Appeal in Northern Ireland, as the case may be."

By sect. 1, sub-s. 1, of the Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, Sess. 2, c. 2), the Government of Ireland Act, 1920, ceased to apply to any part of Ireland other than Northern Ireland on 5th December, 1922. The Constitution of the Irish Free State did not come into operation until the next day (December 6th, 1922).

By the Constitution of the Irish Free State set forth in the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922), Sch. I, and in the Irish Free State Constitution Act, 1922 (13 Geo. 5, Sess. 2, c. 1), it is provided, Article 73: "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."

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Lavery, for the plaintiffs:—

The Judgments Extension Act, 1868, applies in the Irish Free State now as it formerly did in Ireland. Sect. 3 of the Adaptation of Enactments Act, 1922 (No. 2 of 1922), enacts that for the purpose of the construction of any British statute the name "Ireland" shall mean Saorstát Éireann. *Wakely* v. *Triumph Cycle Co.* (1) is not binding on this Court.

[He also referred to *R.* (*Armstrong*) v. *The County Court Judge of Wicklow* (2); *In re Howe Machine Co., Fontaine's Case* (3); *Gremson* v. *Lipman* (4).]

MEREDITH J.:—

The point of law to be decided on this application is whether or not the Judgments Extension Act, 1868, now applies in the Irish Free State. It obviously does apply if it was "in force in the Irish Free State," within the meaning of Article 73 of the Constitution, at the date of the coming into operation of the Constitution. That is a question the answer to which depends on the construction of the words "in force" as used in Article 73. It was held by the Court of Appeal in England in *Wakely* v. *Triumph Cycle Co.* (1) that, as the result of the Irish Free State (Consequential Provisions) Act, 1922, the Government of Ireland Act, 1920 (including sect. 41, sub-s. 1, of that Act), ceased to have any operation in Southern Ireland on December 5th, 1922. There were no Courts to which the Judgments Extension Act could apply for the time being, and, accordingly, that Act ceased to have any application, or be "in force" in the Irish Free State. Hence, when the Constitution sprang into being on the 6th December 1922, and when Article 73 continued in full force all laws in force in the Irish Free State at the coming into operation of the Constitution, the Judgments Extension Act, having ceased to be "in force," had passed beyond the reach of that Article. The words of life in Article 73 could not revive the dead. It may be observed that Article 73 speaks of laws in force "in the Irish Free State" and not "in Southern Ireland," but, for argument's sake, attention may be confined to the one point that the whole reasoning implies that, if an unrepealed Act ceases for the moment to have any practical application owing to the temporary non-existence of that in respect of which it can be applied, it thereupon ceases to be "in force" and, more particularly, ceases to be "in force" within the meaning of Article 73 of the Constitution. Certainly this seems, generally speaking, a very strained interpretation of the words "in force." It seems like saying a Sunday Closing Act would cease to be in force on a Monday, instead of simply saying that it would not apply on that day. So it does not seem unnatural to speak of an

(1) [1924] 1 K. B. 214.
(2) [1924] 2 I. R. 139.
(3) 41 Ch. D. 118.
(4) 58 Ir. L. T. R. 93.

unrepealed Act as being an existing enactment, even pending the passing of an Adaptation Act required to give it any actual application. So, also, there does not seem to be any reason why an Act might not be made to come into operation on a particular day, even though the Act by its terms only referred to something which might not come into existence till a later day. The expression "in force" does not seem to imply more than this. There is a distinction which is clearly recognised in the preamble to the Adaptation of Enactments Act (No. 2 of 1922) between an Act being "in force" and having "full force and effect," and it was only the "full force and effect" of the Judgments Extensions Act that could be temporarily affected by the Act of 1920 ceasing to be in operation on the 5th December, 1922. Article 73 contemplated a subsequent Adaptation of Enactments Act, and both that Article and the Adaptation of Enactments Act would be stultified if existing enactments did not remain in force, pending the coming into operation of the Adaptation of Enactments Act. I have only to add that whatever may, in general, be the meaning of the words "in force" when applied to an Act, it is clear to my mind that what Article 73 preserves are existing, in the sense of unrepealed, Acts, and that interpretation is borne out by the reference to repeal at the end of the Article. Consequently, though a certificate of an English judgment may be registered in the Irish Free State, the converse does not hold.

Solicitors for the plaintiffs: *Hoey & Denning.*

H. H.

K. B. Div. (*N. I.*) 1924.

June 5.

REX (CASSIDY) *v.* JUSTICES OF FERMANAGH (1).

Certiorari—Justices—Summary jurisdiction—Constitution of Court of Petty Sessions—Offence committed in one Petty Sessions District—Trial in different district of same County — Illicit Distillation (Ireland) Act, 1831 (1 & 2 *Wm.* 4, *c.* 55), *sect.* 16 *and sects.* 31–41 — *Petty Sessions (Ireland) Act,* 1851 (14 & 15 *Vict. c.* 93)—*Illicit Distillation (Ireland) Act,* 1857 (20 & 21 *Vict. c.* 40), *sect.* 6—*Revenue (No.* 2) *Act,* 1861 (24 & 25 *Vict. c.* 91), *sect.* 18 — *Finance Act,* 1923 (13 & 14 *Geo.* 5, *c.* 14), *sect.* 13, *sub-s.* 4.

A Summons under the Petty Sessions (Ireland) Act, 1851, was issued against C. The summons was signed by a Resident Magistrate of the County of Fermanagh, and required C. to attend as defendant at a Court of Summary Jurisdiction to be held at Lisnaskea, in that county, on 9th February, 1924, to answer a complaint that he had in his possession in a house occupied by him a certain quantity of potale, not being for the purpose of being made into beer for private use, contrary to the Illicit Distillation (Ireland) Act, 1831 (1 & 2 Wm. 4, c. 55), sect. 16. C. attended the Court of Summary Jurisdiction, and it was contended on his behalf that the Court as then constituted was not a Court of Petty Sessions under the Petty Sessions (Ireland) Act, 1851, and that the Court had no jurisdiction to try an offence committed in a different Petty Sessions District. It was further contended that the Justice who signed the summons, did so without jurisdiction in calling on C. to appear before a Court other than that to which he was amenable under the Petty Sessions (Ireland) Act, 1851.

The Court overruled the objections, and convicted C. of the offence charged against him.

Upon an application to make absolute a conditional order for a certiorari to quash the conviction:—

Held by the King's Bench Division (N.I) (Sir Denis Henry, Bart., C.J., and Brown J.) that the Court had jurisdiction to dispose of the case, and that as this jurisdiction was not limited to any particular part of the County, the conditional order for certiorari should be discharged.

CERTIORARI.

Motion to make absolute a conditional order for a certiorari to bring up and quash a conviction of the prosecutor under the Illicit Distillation (Ireland) Act, 1831 (1 & 2 Wm. 4, c. 55).

The facts as appeared from the affidavits were as follows:—

A summons under the Petty Sessions (Ireland) Act, 1851, was issued against the prosecutor at the suit of the complainant, H. S. Robinson, District Inspector, Royal Ulster Constabulary. The summons was signed by Samuel C. Clarke, a Resident Magistrate for the County of Fermanagh, and required the prosecutor to attend at a Court of Summary Jurisdiction to be held at Lisnaskea, in same county, on 9th February, 1924, to

(1) In the King's Bench Division (N.I.), before SIR DENIS HENRY, Bart., C.J., and BROWN J.

answer a complaint that he had in his possession in a house occupied by him, a certain quantity of potale, viz., three pints, not being for the purpose of being made into beer for private use, contrary to the Illicit Distillation (Ireland) Act, 1831 (1 & 2 Wm. 4, c. 55), sect. 16.

The defendant attended with his solicitor at the Court of Summary Jurisdiction at the Court-house, Lisnaskea, on 9th February, 1924. This Court was held at the conclusion of the ordinary Petty Sessions business for the district of Lisnaskea. The ordinary justices left the bench when the cases with which they had jurisdiction to deal had concluded, leaving the remaining cases to be determined by Samuel C. Clarke and Captain Gosselin, two Resident Magistrates, who constituted the Court of Summary Jurisdiction. The clerk of the Lisnaskea Petty Sessions district continued in Court, and proceeded to call on the cases to be dealt with by the two Resident Magistrates. All these cases were entered in the book of the Lisnaskea Petty Sessions district, and were numbered in the said book with a large number of cases which were disposed of by the Court, presided over by Samuel C. Clarke and a number of justices of the county.

The solicitor for the prosecutor objected to the summons being entered upon by the Court, contending that the Court, as then constituted, was not a Court of Petty Sessions under the Petty Sessions (Ireland) Act, 1851, under which Act the Summons was brought, that the defendant resided in the Petty Sessions district of Roslea, in which district there was a Court-house provided, where monthly Petty Sessions Courts were held as provided by the Act, and that the Court of Summary Jurisdiction had no jurisdiction to hear the summons. He further contended that the justice who signed the summons, signed it, without and in excess of jurisdiction, in calling on the prosecutor to appear before a Court other than that to which he was amenable under the Act on which the summons was issued.

The Court of Summary Jurisdiction overruled the objections, heard the case, convicted the defendant, and fined him £10.

A conditional order for certiorari to quash the conviction having been made:

S. C. Porter, for the prosecutor, moved to make the order absolute.

This prosecution is brought under sect. 16 of the Illicit Distillation (Ireland) Act, 1831 (1 & 2 Wm. 4, c. 55), although it purports to be brought under the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93). Although the prosecutor resided in the Petty Sessions district of Roslea, where there was a Court-house and where monthly Petty Sessions Courts were held, he was commanded to appear at a Court of Summary Jurisdiction at Lisnaskea.

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Had the Crown adopted the procedure under the Illicit Distillation (Ireland) Act, 1831, the defendant would have been tried at the Petty Sessions Court at Roslea, where the offence, if any, was committed. The procedure under the Petty Sessions (Ireland) Act, 1851, having been adopted, there was no power to try this man at Lisnaskea.

There was no change in the law or procedure applicable until the passing of the Finance Act, 1923 (13 & 14 Geo. 5, c. 14), which, by sect. 13, sub-s. 4, provided that the Court of Summary Jurisdiction for the purpose of any proceedings under the Illicit Distillation (Ireland) Act, 1831, should be constituted of not less than two resident magistrates. I submit that the effect of this section was not to change the Court, but only to alter its constitution. Previously the ordinary method of procedure was before the ordinary justices at Petty Sessions; the Act provided that, instead of the justices, the Court was to be constituted of not less than two resident magistrates. The prosecutor should have been tried in the Petty Sessions district where he resides. The Finance Act, 1923, gave no additional powers; the two resident magistrates were simply in the position that ordinary justices would have been, if they had been eligible to sit.

The whole purpose and intention of the Petty Sessions Act was to bring the Court home to the people, and Petty Sessions districts were established for the convenience of the public. There can be no jurisdiction unless the case is properly brought before the Court. The Petty Sessions (Ireland) Act, 1851, sect. 8, sub-s. 2, provided that cases of summary jurisdiction should not be heard out of Petty Sessions, i.e. the Court must sit in the Court-house of the Petty Sessions district. If the whim of the magistrate is to determine where a man is to be tried, there is no object in setting up Petty Sessions districts at all. *Reg.* v. *Beckley* (1) has no application to the present case; it does not refer to any Act which corresponds to the Petty Sessions (Ireland) Act, 1851. This case differs from cases arising under the Intoxicating Liquor Act (Northern Ireland), 1923, or under the Criminal Law and Procedure (Ireland) Act, 1887, because the Act under which it is brought did not set up a new tribunal. The defendant was not properly before the two justices, sitting at Lisnaskea. The summons was issued under the Petty Sessions Act, 1851, and the conviction purports to have been made under the same Act. The defendant could have been tried for this very offence at Roslea, and the two resident magistrates had no jurisdiction to try this offence; the conviction is therefore bad.

[He also referred to the Illicit Distillation (Ireland) Act, 1857 (20 & 21 Vict. c. 40), sect. 6, and the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), sect. 9.]

(1) 20 Q. B. D. 187.

Megaw K.C. and *J. C. Davidson*, for the respondents:—

The question is one of very considerable importance. The case was to be determined under the Finance Act, 1923, and it does not fall within the Petty Sessions (Ireland) Act, 1851, at all. The law is accurately expressed in Humphreys' Justice of the Peace (8th edition) in a note on p. 697: "A conviction is good although it may not take place in the Petty Sessions district where offender resides, or offence committed, provided it be in the county." There is no limitation to be found in sect. 10 of the Petty Sessions Act, 1851. We submit that this case was within the jurisdiction of the magistrates, and that the question of the Petty Sessions district is solely a matter of administration. We submit that there is no distinction between the present case and *Reg.* v. *Beckley* (1), and we rely on the observations contained in the judgments at p. 190. The law applicable in England is also applicable here. There is nothing limiting the jurisdiction to any particular part of the county; see the judgment of Lord O'Brien C.J. in *Great Southern and Western Railway Co.* v. *Leyden* (2). What is material, is not the summons, but the charge. The Court of Summary Jurisdiction had power to determine the matter, and we submit the Divisional Court has no power to interfere with it by certiorari.

[They also referred to the Interpretation Act, 1889, sect. 13, sub-s. 11, and *Reg.* v. *The Justices of Galway* (3).]

SIR DENIS HENRY, Bart., C.J., having stated the facts, delivered the judgment of the Court as follows:—

The present case has been put very clearly before us. The Finance Act, 1923 (13 & 14 Geo. 5, c. 14), is extremely important as it made the penalties much more severe than they had previously been. It provided by sect. 13, sub-s. 4, that: "For the purpose of any proceedings under the Illicit Distillation (Ireland) Act, 1831, as amended by any other enactment (including this section) or under any such amending enactment, a Court of Summary Jurisdiction shall be constituted of not less than two resident magistrates, and no justice of the peace, not being a resident magistrate, shall have jurisdiction to act on the hearing of or in connexion with any such proceedings." This Act did two things, it provided that there must be at least two resident magistrates and that no justice of the peace, not being a resident magistrate, should have jurisdiction.

It is provided by section 11, sub-s. 6, of the Criminal Law and Procedure (Ireland) Act, 1887 (50 & 51 Vict. c. 20), that "the Court of Summary Jurisdiction shall elsewhere than within the police district of Dublin Metropolis be two resident magistrates in Petty Sessions." It is also provided by sect. 11,

(1) 20 Q. B. D. 187. (2) [1907] 2 I. R. 160, at p. 163. (3) 6 L. R. I. 1.

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sub-s. 3, of the same Act, "that if an offence is prosecuted summarily under this Act the same shall be prosecuted before a Court of Summary Jurisdiction in manner provided by the Petty Sessions (Ireland) Act, 1851, and subject to the provisions thereof."

The importance of these sections becomes manifest from the judgment of Palles C.B. in *Ex parte The Rev. Daniel Stephens* (1). In his judgment at p. 306, Palles C.B. said: "I am, however, prepared to hold, and I prefer putting my judgment upon the broader ground, that it is not necessary under this Act of Parliament that the act which is the subject of prosecution should be proved to have been committed within the Petty Sessions district in which the case is heard, although, of course, it must be proved to have been committed within the proclaimed district. The jurisdiction of the justices is given by commission; and that commission, in the case of county justices, ranges over the entire county, and whatever arrangements of convenience may be made as to particular magistrates sitting in particular Petty Sessions districts, the tribunal of magistrates, provided they have the qualifications mentioned in the Crimes Act, has a jurisdiction extending over the entire county, and not limited to acts committed in the particular Petty Sessions district in which it is sitting."

The present case seems to be absolutely on all fours with the *Rev. Daniel Stephens' Case* (1). We are of opinion that the Court had jurisdiction within the County of Fermanagh, and that jurisdiction is not limited to any particular part of the county.

Accordingly we discharge the conditional order, and we make no order as to costs.

Solicitor for prosecutor: *John G. Magrath.*

Solicitor for respondents: *John R. Moorhead, Chief Crown Solicitor.*

J. M'C.

(1) Judgments of the Superior Courts in Ireland in cases under the Criminal Law and Procedure (Ireland) Act, 1887, p. 397.

REX (MURRAY) *v.* THE COUNTY COURT JUDGE OF THE COUNTY OF FERMANAGH,

K. B. Div. (*N. I.*) 1924.

June 5.

Intoxicating Liquor Act (*Northern Ireland*), 1923 (13 & 14 *Geo.* 5, *c.* 12), *s.* 9—*Application by holder of a six-day and early closing licence for an ordinary seven-day licence.*

By section 9 of the Intoxicating Liquor Act (Northern Ireland), 1923 (13 & 14 Geo. 5, c. 12), "From and after the passing of this Act no licence shall be granted for the sale of intoxicating liquor, whether for consumption on or off the premises, except—for premises which are lawfully licensed at the date of the passing of this Act, or which were lawfully licensed at any time since the first day of January, 1920."

Held, by the King's Bench Division (N.I.) (Sir Denis Henry, Bart., C.J., and Brown J.), that the exception in question did not entitle the holder of a six-day and early closing licence to an ordinary seven-day licence.

CERTIORARI.

At the General Licensing Quarter Sessions held on January 25th, 1924, at Enniskillen, Co. Fermanagh, Rebecca J. Kelly had applied for an ordinary seven-day licence in respect of her house and premises, she being at the time of such application the holder of a six-day and early closing licence carrying on business as such in her premises at 9 Market Street, Enniskillen.

Objection was made on behalf of the District Inspector of Constabulary to the granting of such licence on the ground that it was an application for a new licence.

The County Court Judge granted the application.

A conditional order for a certiorari to quash the County Court Judge's order having been obtained on behalf of the prosecutor:

J. C. Davison, for the prosecutor, District Inspector Murray, moved to make the order absolute.

There was no jurisdiction to grant this licence, which was more comprehensive in quality and quantity than the one previously held by the licensee. The County Court Judge has in effect granted a new licence, which was forbidden by sect. 9 of the Intoxicating Liquor Act (Northern Ireland), 1923, and the licensee did not come within the exception contained in sub-s. (*a*) (*i*) of that section.

The same question was decided under the Licensing (Ireland) Act, 1902 (2 Edw. 7, c. 18), and there is a whole chain of authorities decided under that Act. Amongst these are *Rex* (*Dorrian*) v. *Greer* (1); *Rex* (*Collins*) v. *Justices of Donegal* (2); *Dorrian* v. *M'Hugh* (3); *Rex* (*Henderson*) v. *Justices of Louth* (4). The same point had previously been decided in *Reg.* (*Burke*) v. *The Recorder of Dublin* (5) *and Reg.* (*Egan*) v. *Cathcart* (6) under the Licensing Act, 1872.

Murphy K.C. (with him *Macdermott*), for Rebecca J. Kelly, submitted that the authorities referred to did not apply in view of the altered circumstances created by the Intoxicating Liquor

(1) 3 N. I. J. 302.
(2) [1903] 2 I. R. 533.
(3) [1907] 2 I. R. 564.
(4) [1911] 2 I. R. 312.
(5) 2 L. R. I. 385.
(6) 4 L. R. I. 567.

K. B. Div. (*N. I.*) 1924.

R. (MURRAY) v. C.C.J. OF COUNTY FERMANAGH.

Act (Northern Ireland), 1923 (13 & 14 Geo. 5, c. 12). The County Court Judge had authority to grant the licence. The legislature evidently intended that there should be only one class of licence, and that all licensed premises should open and close at the hours set out. The Intoxicating Liquor Act (Northern Ireland), 1923, directs that no licence shall be granted except for premises lawfully licensed, and this requirement has been fulfilled. The granting of this licence would not contravene the dictum that the new licence must not be more comprehensive in quantity and quality than the old one. The Act of 1923 was passed with a definite object to cut down all licences to six days and to restrict hours of sale in licensed premises, it has in effect cut down all ordinary publicans' licences. The net point in this case is whether the decision in *Rex* (*Dorrian*) v. *Greer* (1) is applicable. There is nothing to show that what we are seeking now is more comprehensive in quality and quantity than what we previously possessed, and we submit that we are entitled to the licence.

SIR DENIS HENRY, Bart., C.J., delivered the judgment of the Court as follows:—

This is an application on the part of Mrs. Rebecca Jane Kelly, of 9 Market Street, Enniskillen, County Fermanagh, for an ordinary licence under sect. 9 of the Intoxicating Liquor Act (Northern Ireland), 1923. The applicant had previously had a six-day and early closing licence, under which she was obliged to close her licensed premises at 8 p.m.; whereas the holder of an ordinary licence need not close until 9 p.m. The County Court Judge granted the application, and the matter now comes before us on an application on the part of the Crown to bring up the County Court Judge's order on certiorari for the purpose of being quashed.

The question that is raised here has been the subject of a good deal of litigation, and is of additional importance under the Intoxicating Liquor (Northern Ireland) Act, 1923. It had already been held under the Licensing (Ireland) Act, 1902 (2 Edw. 7, c. 18), that the holder of an early closing six-day licence could not be granted an ordinary six-day licence. The holder of a six-day licence paid six-sevenths of the duty that would have been paid by the holder of a seven-day licence.

In our opinion an application such as this to have a licence extended amounts to an application for a new licence, and this is in effect prohibited by the two Acts of Parliament, as is shown by the case of *Rex* (*Dorrian*) v. *Greer* (1). It is quite clear that there was no power in the County Court Judge to grant a new licence, and that his order was wrong. The rule for certiorari must be made absolute, but as this is the first case under the recent Act of Parliament, we make no order as to costs.

Solicitor for the prosecutor: *John R. Moorhead, Chief Crown Solicitor for Northern Ireland.*

Solicitors for the licensee, Rebecca J. Kelly: *Clarke & Gordon.*

J. M'C.

(1) 3 N. I. J. 302.

THE STATE *v.* THOMAS TREANOR.
THE STATE *v.* CHARLES FLOOD.
THE STATE *v.* BERNARD TREANOR.
AND
THE STATE *v.* PATRICK KELLY (1).

Court of Crim. App. (I. F. S.) 1924.

Aug. 20, 21, 22, 25. Sept. 2.

Criminal Appeals—Admission of evidence—Confession induced by threats—Confession not made to the person using threats—Inadmissibility of confession—Duty of Judge when evidence tendered in order to prove inadmissibility — Discharge of jury or setting aside their verdict—Common design by several persons to rob banks—No direct evidence of common design — Evidence sufficient to sustain conviction for robbery—Constructive robbery of one bank by assisting at the robbery of another—Insufficiency of Judge's summing-up—No advice to jury as to connecting offence proved with different crime charged in indictment—Setting aside conviction.

A confession made to any person under the influence of a promise or threat held out by a person in authority, calculated to induce the confession, is inadmissible, unless it be clearly proved to the satisfaction of the Judge (whose duty it is to decide the question), that the promise or threat did not operate upon the mind of the accused, and that the confession was voluntary notwithstanding, and that the accused was not influenced to make it by the previous promise or threat.

If evidence be tendered to prove the inadmissibility of evidence prima facie admissible, it is the duty of the Judge to receive it, and to decide the question of admissibility, before the evidence is given in the hearing of the jury.

Judgment of Parke B. in *Bartlett* v. *Smith*, 11 M. & W. 483, approved, and judgment of Lord Tenterden C.J. in *Jones* v. *Fort*, Moo. & M. 196, held to have been over-ruled by *Boyle* v. *Wiseman*, 11 Ex. 360.

If, upon taking evidence to prove the inadmissibility of a statement already admitted subject to disallowance at a later stage, its inadmissibility were clearly established, the Judge would be bound to discharge the jury, or their verdict—if it might conceivably have been influenced by the illegal evidence—could not be permitted to stand.

The four appellants were convicted of having, while armed, made an assault upon officials of the H. Bank at Monaghan, and of having feloniously stolen a sum of money, the property of the bank, and all of them were sentenced to terms of penal servitude. The trial Judge having refused a certificate, in the case of each appellant, that the case was a fit case for appeal, each of them appealed to the Court of Criminal Appeal under sect. 31 of the Courts of Justice Act, 1924 (No. 10 of 1924), on the ground that certain confessions alleged to have been made by two of the appellants were wrongly admitted, and also on the ground of misdirection by the trial Judge in charging the jury. The four appeals were heard together.

1. THE STATE *v.* BERNARD TREANOR:—In this case evidence was given of a confession alleged to have been made by the appellant to one person in consequence of threats made by another person in authority, and the trial Judge was of opinion that threats made except by or in the presence of the person to whom the confession was made were irrelevant to the question of the admissibility of the confession. The Court of Criminal Appeal *held* this opinion to be erroneous. And, as the Court was not satisfied that no threats were made to the appellant, or that, if made, the effect of them had disappeared before the interview took place at which the appellant made the confession, the Court *held* that the evidence of the confession should not have been admitted. And, as it was not clear that the jury must have convicted the appellant upon the evidence apart from his confession, the verdict was set aside and the appeal allowed.

(1) In the Court of Criminal Appeal, before KENNEDY C.J., SULLIVAN J. (President of the High Court), FITZGIBBON, and MURNAGHAN JJ.

Court of Crim. App. (*I. F. S.*) 1924.

THE STATE *v.* TREANOR AND OTHERS.

2. THE STATE *v.* THOMAS TREANOR:—In this case an alleged confession by the appellant was elicited by his counsel in the cross-examination of a witness. It was not volunteered by the witness or obtruded in an irrelevant manner, but was elicited in an attempt to prove that no statement had been made, and the Court of Criminal Appeal *held* that it was properly admitted, and the appeal was, therefore, dismissed.

3. THE STATE *v.* PATRICK KELLY:—In this case it was contended for the prosecution that the evidence established a common design by all the appellants, with other persons, to raid all the banks in Monaghan, and to make an attack upon the Court House (where the military were) to enable the raid on the H. Bank to be carried out without interference, and that, accordingly, proof that the appellant was engaged, either in attacking the Court House or in raiding some other bank would sustain an indictment against him for robbing the H. Bank. It was also contended that the possession by the appellant of notes recently stolen from another bank (the P. Bank) was evidence upon which he might have been convicted of robbing that bank, and so of having been party to the alleged design of robbing all banks including that charged in the indictment (the H. Bank), and that, therefore, he was properly convicted of stealing the money from the H. Bank. No direct evidence of the common design was offered by the prosecution, but it was left to be inferred from vague references in the evidence. The summing-up of the trial Judge contained no advice to the jury upon the necessity for connecting the offence proved against the appellant with the different crime charged in the indictment:

The Court of Criminal Appeal *held* that, as the prosecution sought to establish, not a conspiracy to rob several banks, but a constructive robbery of one by assisting in the robbery of another, the grounds upon which the appellant might have been convicted of the charge laid in the indictment should have been very carefully expounded to the jury, and they should have been warned that if they considered that the appellant (who was not actually identified as having been present at any bank or with the raiding party, and upon whom no arms were seen or found) was in fact only a receiver of stolen property without previous participation in the robbery, they should not convict him even of stealing from the P. Bank, still less of the constructive robbery of the H. Bank. As the Court were of opinion that the jury did not receive such instructions as would enable them to appreciate the bearing of the evidence upon the charge, the conviction of the appellant was set aside and the appeal allowed.

4. THE STATE *v.* CHARLES FLOOD:—In this case the Court of Criminal Appeal *held* there was no ground for interfering with the verdict, and the appeal was dismissed.

It is not the duty of the Court of Criminal Appeal to scrutinize the summing-up of the trial Judge for trifling misstatements in the evidence.

Each of the appellants, as one ground of appeal, alleged misdirection on the part of the trial Judge in telling the jury in the course of his charge that all the appellants disappeared after the raid. The Court of Criminal Appeal, upon a consideration of the summing-up and the evidence upon which it was based, *held* that, on this point, there was no misdirection which would entitle the appellants, or any one of them, to have the convictions set aside.

CRIMINAL APPEALS.

Appeals by the defendants under s. 31 (ii) of the Courts of Justice Act, 1924 (No. 10 of 1924) (Irish Free State) (1), from

(1) This being the first reported decision of the Court of Criminal Appeal established by the Courts of Justice Act, 1924 (No. 10 of 1924) (Irish Free State), the following sections of that Act are quoted as being expressly or impliedly referred to in the arguments and judgment. [A.D.B., Ed.]

S. 28.—The Court of Criminal Appeal of Saorstát Eireann shall sit in Dublin, except in cases where the Chief Justice gives special directions that

an order of Mr. Justice O'Shaughnessy sitting in the Central Criminal Court, Dublin, refusing them certificates that their cases were fit cases for appeal to the Court of Criminal Appeal. The four appeals were heard together.

Thomas Treanor, Charles Flood, Bernard Treanor, Patrick Kelly, Francis Treanor, and Hubert John M'Cann were on the 29th July, 1924, at the Central Criminal Court, Dublin, put forward at the prosecution of the State on several indictments,

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it shall sit elsewhere, and the President of the court shall be such member present as shall be entitled to precedence over the other members, and the determination of all questions before the court shall be according to the opinion of the majority of the members present, but unless the court direct to the contrary, the judgment of the court shall be pronounced by the President of the court, or by such other member of the court as the President directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court.

S. 29.—The determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that court to the Supreme Court, unless that court or the Attorney-General shall certify that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court, in which case an appeal may be brought to the Supreme Court, the decision of which shall be final and conclusive.

S. 30.—The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes and subject to the provisions of this Act, have full power to determine any questions necessary to be determined for the purpose of doing justice in the case before it.

S. 31.—A person convicted on indictment before the Central Criminal Court or before any court of the High Court Circuit may appeal under this Act to the Court of Criminal Appeal under the following conditions:—

(i) if the appellant obtains a certificate from the judge who tried him that the case is a fit case for appeal;

(ii) in case of refusal of such certificate if the Court of Criminal Appeal on appeal from such refusal grant leave to appeal.

S. 32.—Leave to appeal shall be granted by the Court of Criminal Appeal in cases where the court is of opinion that a question of law is involved, or where the trial appears to the court to have been unsatisfactory, or there appears to the court to be any other sufficient ground of appeal, and the court shall have power to make all consequential orders it may think fit, including an order admitting the appellant to bail pending the determination of his appeal.

S. 33.—The appeal, in case such certificate or leave to appeal is granted, shall be heard and determined by the Court of Criminal Appeal on the report of an official stenographer present at the trial of the appellant, with power to the court to hear new or additional evidence, and to refer any matter for report by the judge before whom the case was tried.

S. 34.—The Court of Criminal Appeal shall have jurisdiction to affirm or to reverse the conviction in whole or in part, and to remit, or to reduce, or to increase or otherwise vary the sentence, and generally to make such order, including any order as to costs as may be necessary for the purpose of doing justice in the case before the court.

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(including one upon which counsel for the State elected to proceed) of having on the 18th August, 1922, while armed with certain offensive weapons, namely, revolvers, shot guns, pistols, and rifles, made an assault upon Edward J. Smyth and Louis Torrens, and put each of them in fear and danger of his life, and of having feloniously stolen the sum of £450 in money, the property of the Hibernian Bank. The trial lasted for three days, and resulted in the acquittal of Francis Treanor and Hubert John M'Cann, and the conviction of the other four defendants. Bernard and Thomas Treanor, and Charles Flood were each sentenced to five years' and Patrick Kelly to seven years' penal servitude. The evidence at the trial was reported by an official stenographer in accordance with the requirements of sect. 33 of the Courts of Justice Act, 1924 (1), and counsel for the prisoners applied to the Court of Criminal Appeal for a copy of the transcript of the shorthandwriter's note at the expense of the State. This application was grounded on the poverty of the prisoners, but was refused by the Court. Transcripts of portions of the evidence were thereupon extracted on behalf of the prisoners, and the following notices were served on the Registrar of the Court of Criminal Appeal :—

COURTS OF JUSTICE ACT, 1924. (CRIMINAL APPEALS.)

Notice of Application for leave to appeal under section 31 of the Act (2).

To the Registrar of the Court of Criminal Appeal.

I, having been convicted of the offence of having, together with other persons, being armed with certain offensive weapons, made an assault upon Edward J. Smyth and Louis Torrens and put each of them in fear and danger of his life, and of having a sum of £450 in money, the property of the Hibernian Bank, Limited, then being in the lawful custody and possession of the said Edward J. Smyth and Louis Torrens, feloniously stolen, taken, and carried away, and, thereupon sentenced to five years' penal servitude, and, having applied to the Judge who tried me for a Certificate that my case was a fit case for appeal, and having been refused such Certificate, and being now a prisoner in Mountjoy Gaol, and being desirous of appealing against my said conviction and sentence, Do hereby give you Notice that I hereby apply to the Court of Criminal Appeal for leave to appeal on the grounds hereinafter set forth.

(Signed) THOMAS TREANOR.

Dated this 5th day of August, 1924.

Particulars of Trial and Conviction :—

1. Dates of Trial: 29th, 30th, and 31st July, 1924.
2. In what Court tried: Central Criminal Court, Dublin.
3. Sentence: Five Years' Penal Servitude.

(1) S. 33 is quoted in the note on preceding page.
(2) S. 31 is quoted in the note on preceding page.

GROUNDS FOR APPLICATION.

1. That a question of law is involved, as I am advised, and that the trial was unsatisfactory by reason of misreception of evidence and misdirection on the part of the learned Judge, of which the following are particulars:—

(*a*) The learned Judge erroneously admitted evidence of an alleged interchange of words between the witness, Captain John M'Kenna, and me, and that, in the course of such interchange, someone asked me did I get anything out of the Bank raid, to which I replied in the negative, and that Captain John M'Kenna then said: "How is it Barney got £5?" and that I then said: "I got £5, too." The said last-mentioned statement "I got £5, too" was not proved to have been made voluntarily, if at all, and evidence tendered by counsel on my behalf to show that the said statement was not made voluntarily, if at all, was not permitted by the learned Judge to be given until after the admission in evidence of the said statement and interchange of words.

(*b*) The learned Judge told the jury that all the accused disappeared after the raid, and that if they believed the witness, Francis Watson, there could be no doubt that the £10 notes, of which the numbers were given in evidence, were stolen from the Provincial Bank during the raid.

2. There was no evidence to support the verdict of the jury against me.

3. There was a miscarriage of justice.

I desire to be present when the Court of Criminal Appeal considers my present application.

COURTS OF JUSTICE ACT, 1924. (CRIMINAL APPEALS.)

Notice of Application for leave to appeal under section 31 of the Act.

To the Registrar of the Court of Criminal Appeal.

I, having been convicted of the offence of having, together with other persons, being armed with certain offensive weapons, made an assault upon Edward J. Smyth and Louis Torrens and put each of them in fear and danger of his life, and of having a sum of £450 in money, the property of the Hibernian Bank, Limited, then being in the lawful custody and possession of the said Edward J. Smyth and Louis Torrens, feloniously stolen, taken, and carried away, and, thereupon sentenced to five years' penal servitude, and, having applied to the Judge who tried me for a Certificate that my case was a fit case for appeal, and having been refused such Certificate, and being now a prisoner in Mountjoy Prison, and being desirous of appealing against my said conviction and sentence, Do hereby give you Notice that I hereby apply to the Court of Criminal Appeal for leave to appeal on the grounds hereinafter set forth.

(Signed) CHARLES FLOOD.

Dated this 2nd day of August, 1924.

Particulars of Trial and Conviction:—

1. Dates of Trial: 29th, 30th, and 31st July, 1924.
2. In what Court tried: Central Criminal Court, Dublin.
3. Sentence: Five Years' Penal Servitude.

GROUNDS FOR APPLICATION.

1. That a question of law is involved, as I am advised, and that the trial was unsatisfactory by reason of misreception of evidence, misdirection, and non-direction on the part of the learned Judge, of which the following are particulars:—

(*a*) The jury were told that they could act on the confession alleged to have been made by Bernard Treanor to Inspector M'Kenna.

(*b*) The jury were not told that the said alleged confession was inadmissible if induced by threat or inducement made or held out by any person in authority, whether such person was the person to whom such confession was alleged to have been made or not.

(*c*) By reason of (*a*) and (*b*) the trial of the said Bernard Treanor was prejudiced, and I was indirectly prejudiced thereby, as evidence was given that I was in the company of, or associated with, the said Bernard Treanor during the time of the raid.

(*d*) The jury were told in error that all the accused disappeared after the raid.

2. There was no evidence to support the verdict against me.

3. There was a miscarriage of justice.

I desire to be present when the Court of Criminal Appeal considers my present application.

COURTS OF JUSTICE ACT, 1924. (CRIMINAL APPEALS.)

Notice of Application for leave to appeal under section 31 of the Act.

To the Registrar of the Court of Criminal Appeal.

I, having been convicted of the offence of having, together with other persons, being armed with certain offensive weapons, made an assault upon Edward J. Smyth and Louis Torrens and put each of them in fear and danger of his life, and of having a sum of £450 in money, the property of the Hibernian Bank, Limited, then being in the lawful custody and possession of the said Edward J. Smyth and Louis Torrens, feloniously stolen, taken, and carried away, and, thereupon sentenced to five years' penal servitude, and, having applied to the Judge who tried me for a Certificate that my case was a fit case for appeal, and having been refused such Certificate, and being now a prisoner in Mountjoy Prison, and being desirous of appealing against my said conviction and sentence, Do hereby give you Notice that I hereby apply to the Court of Criminal Appeal for leave to appeal on the grounds hereinafter set forth.

(Signed) BERNARD TREANOR.

Dated this 2nd day of August, 1924.

Particulars of Trial and Conviction:—

1. Dates of Trial: 29th, 30th, and 31st July, 1924.

2. In what Court tried: Central Criminal Court, Dublin.

3. Sentence: Five Years' Penal Servitude.

GROUNDS FOR APPLICATION.

1. That a question of law is involved, as I am advised, and that the trial was unsatisfactory by reason of misreception of evidence, misdirection, and non-direction on the part of the learned Judge, of which the following are particulars:—

(*a*) The jury were told that they could act on the confession alleged to have been made by me to Inspector James M'Kenna.

(*b*) The jury were not told that the said alleged confession was inadmissible if induced by threat or inducement made or held out to me by any person in authority or apparently in authority, whether made or held out by the person to whom the confession was alleged to have been made or not.

(*c*) The jury were erroneously told that all the accused disappeared after the raid.

2. There was no evidence to support the verdict of the jury against me.

3. There was a miscarriage of justice.

I desire to be present when the Court of Criminal Appeal considers my present application.

COURTS OF JUSTICE ACT, 1924. (CRIMINAL APPEALS.)

Notice of Application for leave to appeal under section 31 of the Act.

To the Registrar of the Court of Criminal Appeal.

I, having been convicted of the offence of having, together with other persons, being armed with certain offensive weapons, made an assault upon Edward J. Smyth and Louis Torrens and put them in fear and danger of their lives, and of having a sum of £450 in money, the property of the Hibernian Bank, Limited, then being in the lawful custody and possession of the said Edward J. Smyth and Louis Torrens, feloniously stolen, taken, and carried away, and, thereupon sentenced to seven years' penal servitude, and, having applied to the Judge who tried me for a Certificate that my case was a fit case for appeal, and having been refused such Certificate, and being now a prisoner in Mountjoy Prison, and being desirous of appealing against my said conviction and sentence, Do hereby give you Notice that I hereby apply to the Court of Criminal Appeal for leave to appeal on the grounds hereinafter set forth.

(Signed) PATRICK KELLY.

Dated this 2nd day of August, 1924.

Particulars of Trial and Conviction:—

1. Dates of Trial: 29th, 30th, and 31st July, 1924.
2. In what Court tried: Central Criminal Court, Dublin.
3. Sentence: Seven Years' Penal Servitude.

GROUNDS FOR APPLICATION.

1. That a question of law is involved, as I am advised, and that the trial was unsatisfactory by reason of misdirection, and non-direction, and misreception of evidence, as against me, by the learned Judge, of which the following are particulars:—

(*a*) The jury were told that if they believed the witness, Francis M'Donald Watson, there could be no doubt that the £10 notes alleged to have been in my possession on 19th August, 1922, were stolen from the Provincial Bank during the raid.

(*b*) The jury were given to understand that they could act on the evidence relating to the said £10 notes, in proof of the charge on which I was indicted.

(*c*) The jury were told that all the accused disappeared after the raid.

2. There was no evidence to support the verdict of the jury against me.

3. There was a miscarriage of justice.

I desire to be present when the Court of Criminal Appeal considers my present application.

ON the hearing of the appeals all the evidence was fully opened to the Court and the cases fully discussed as if certificates had been obtained from the trial Judge that the cases were fit cases for appeal. The note of the evidence ran to a considerable length, but the extracts therefrom set out in the judgment of the Court are sufficient for the purposes of this report.

M. Comyn K.C. and *W. Black* for the appellants:—

In order that a confession made by the accused may be admitted in evidence against him, it must be proved affirmatively

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to have been voluntary: *R.* v. *Thompson* (1), and per Lord Sumner in *Ibrahim* v. *Rex* (2). And it is not a voluntary confession if a threat has been used by a person in authority, and in this connexion "a person in authority" is given the widest interpretation: *R.* v. *Upchurch* (3); *R.* v. *Simpson* (4); *R.* v. *Windsor* (5); *R.* v. *Enoch* (6). The persons who, we say, used the threats come within these authorities. The threat or inducement need not be proved to have been made or induced by the person to whom the confession is made. It is clear from the learned Judge's charge to the jury that he considered a confession would be admissible which was obtained by a threat or inducement made by one person, if the confession were made to another person. That is not so: *R.* v. *Cooper* (7); *R.* v. *Doherty* (8). The rule that the confession must be proved to have been voluntarily made before admission was violated in this case. And once the confession was wrongfully allowed in, there was no course open but to have the jury discharged.

It is not sufficient for the Judge to tell the jury not to act on illegal evidence admitted, and it is no answer to say that the verdict could have been sustained without the illegal evidence: *Alex. Hemingway's Case* (9). If the Court come to the conclusion that the evidence was wrongfully admitted, it is not material for the appellants to show that it influenced the jury. It is sufficient, for the purpose of quashing the conviction, if the evidence wrongfully admitted might possibly have coloured the whole case: *William Barron's Case* (10).

Carrigan K.C. and *Dudley White K.C.* for the State:—

The application is made under sect. 32 of the Courts of Justice Act, 1924 (11). Leave to appeal is only to be granted where the Court is of opinion that a question of law is involved, or where the trial appears to the Court to have been unsatisfactory, or there appears to the Court to be any other sufficient ground of appeal.

There is no question of law involved in the case, and the trial cannot be said to have been unsatisfactory. What the section means by "any other sufficient ground of appeal" must be decided by the Court. We submit the "other sufficient ground of appeal" must be one based on some principle. The verdict of a jury given after a three days' trial ought not to be lightly set aside.

The case could not have been conducted in any other way than it was. It would be impracticable in the course of every case in which it is alleged that a confession is not voluntarily made,

(1) [1893] 2 Q. B. 12.
(2) [1914] A. C. 599, at p. 609.
(3) 1 Moo. C. C. 465.
(4) 1 Moo. C. C. 410.
(5) 4 F. & F. 360.
(6) 5 C & P. 539.
(7) 5 C. & P. 535.
(8) 13 Cox C. C. 23.
(9) 8 Crim. App. R. 47.
(10) 9 Crim. App. R. 236.
(11) S. 32 is quoted in note (1), on p. 195, ante.

to have evidence there and then taken as to whether the confession was voluntary or not. If it transpired that evidence had been wrongfully admitted in the course of a trial it was the duty of the Judge to tell the jury to disregard it. That was done in this case. It is a common practice both in civil and criminal cases to withdraw part of the evidence from the jury. *Ibrahim* v. *Rex* (1), shows that the trial Judge has a discretion which he is to exercise after considering the whole of the circumstances.

M. Comyn K.C., in reply.

[Other cases cited and discussed:—*Boyle* v. *Wiseman* (2); *Hodge's Case* (3); *R.* v. *Spencer* (4); *R.* v. *Voisin* (5); *Bartlett* v. *Smith* (6); *Jones and Others* v. *Fort* (7).]

Cur. adv. vult.

Sept. 2.

KENNEDY C.J.:—I have asked Mr. Justice FitzGibbon to read the judgment of the Court (8).

FITZGIBBON J.:—

The appellants, Thomas Treanor, Charles Flood, Bernard Treanor, and Patrick Kelly were indicted, along with Francis Treanor and Hubert John M'Cann, upon a charge of having, on the 18th of August, 1922, while armed with certain offensive weapons, namely, revolvers, shot guns, pistols, and rifles, made an assault upon Edward J. Smyth and Louis Torrens, and put each of them in fear and danger of his life, and of having feloniously stolen the sum of £450 in money, the property of the Hibernian Bank.

The trial took place at the Central Criminal Court on the 29th, 30th, and 31st of July, 1924, and resulted in the acquittal of Francis Treanor and Hubert John M'Cann, and the conviction of the four appellants, of whom Bernard and Thomas Treanor and Charles Flood were sentenced to five years' and Patrick Kelly to seven years' penal servitude. Each of the appellants duly made application to the Judge at the trial for a certificate that his case was a fit case for appeal, and in each case the application was refused, and an appeal from the refusal was made to this Court. Upon the hearing of the appeal all the evidence was fully opened to the Court, and the case of each appellant was discussed at length both by counsel for the appellant and for the State, and the Court is in a position to dispose finally of each case as if a certificate had been granted and the case had been argued thereon.

(1) [1914] A. C. 599.
(2) 11 Exch. 360.
(3) 2 Lew. C. C. 227.
(4) 7 C. & P. 776.
(5) [1918] 1 K. B. 531.
(6) 11 M. & W. 483.
(7) Moo. & M. 196.

(8) Under sect. 28 of the Courts of Justice Act, 1924 (cited in note (1), ante, p. 194), provision is made for only one member of the Court pronouncing the judgment of the Court.

Court of Crim. App. (I. F. S.) 1924.

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FitzGibbon J.

The appeals of Charles Flood, Thomas Treanor, and Bernard Treanor are grounded, in the main, upon the admission of certain confessions alleged to have been made by Thomas and Bernard Treanor, and upon alleged misdirection upon the part of the Judge in telling the jury in the course of his charge that all the accused disappeared after the raid.

With regard to the last point, it is not the duty of this Court to scrutinize the summing-up of the Judge for trifling misstatements of the evidence, but even if it were, we are of opinion that there was no misstatement as regards any of the appellants. There is evidence that all of the accused were in the town of Monaghan when the raid, which is the subject-matter of the indictment, was taking place, and that they all left the town immediately afterwards. Bernard Treanor, who had lived and worked in Monaghan up to the date of the raid, left his residence and work there altogether, and the military were searching for him and Thomas Treanor at their homes for six weeks or more. Charles Flood was not taken until five days after the raid, when he was captured in an outhouse, in his night attire, endeavouring to escape, and rifle ammunition and two revolvers were found concealed in his house, after he had denied several times that he possessed either arms or ammunition. M'Donnell, a servant of the appellant Patrick Kelly, who was called for the defence, admitted in cross-examination that his master went "on the run," though he endeavoured to minimize the extent of it, after the raid. Upon a careful consideration of the summing-up, and the evidence upon which it was based, the Court has come to the conclusion that there was no misdirection upon this point which entitled the appellants, or any one of them, to have the convictions set aside.

The alleged confession by Thomas Treanor was elicited by his own counsel in the cross-examination of Captain John M'Kenna in the following way:—A previous witness for the prosecution, Superintendent James M'Kenna, in reply to the question: "Did Thomas Treanor make any admission to you about Bank raids?" said: "He did not make any admission without being asked questions—not the same as Bernard. I asked him questions." Counsel for the prosecution then very properly dropped the matter, and the witness was not cross-examined about it. Captain John M'Kenna, the next witness for the prosecution, was not asked upon his direct examination about any admission made to him, or in his presence, by Thomas Treanor, but upon cross-examination this question was put to him, "Did Thomas Treanor say anything to you about being in the raid?" "Yes, he did. There is no doubt in my mind about that." He was then further cross-examined in an attempt to shake his recollection, the evidence being as follows:—

Did Thomas Treanor say anything to you about being in the raid? Yes; he did. There is no doubt in my mind about that.

Was Commandant M'Kenna there when he said it? He was.

Did you hear Commandant M'Kenna say in answer to a question here (the last question he was asked), that Thomas Treanor did not say anything about being in the raid? I did.

That is not true? He might not have heard him. I heard him.

He was in the room? Yes.

And, of course, he was paying attention to the inquiry you were conducting—he was the head officer there? Yes.

And put questions? Yes.

And never heard this important confession of Thomas Treanor? I heard it. He denied it first, and I said to him, "Barney says you all got it," and he says, "I got it too."

Was Captain Houston in Clones Barracks that day? He would be.

Did you see him threaten any of the men? No.

Did you see anyone present a rifle at the prisoners? No rifle in the room.

And no revolver? The office revolver would be there.

I think you have told us already that there was no caution? No caution.

And there were questions put to them about their connexion with the raid? "What did you do with the money from the bank raid?"

There was no caution administered, and there were questions put to the prisoners, one after the other, about being in the raid? There was no caution.

And there were questions put of that kind? There were questions put; but I did not threaten him or anything. He said first, "I got nothing out of it." I said to him, "Barney says you have all got it," and he says, "I have got it too."

The result was that the statement made by Thomas was brought out. It was not volunteered by the witness or obtruded in an irrelevant manner, but was elicited in an attempt to prove that no statement had been made, and the Court is of opinion that it was properly admitted. It only affected Thomas himself, and could not have been regarded by the jury as assisting to establish the guilt of any of the other prisoners.

The alleged admission by Bernard Treanor stands upon somewhat different ground. It was proved upon the direct examination of Superintendent James M'Kenna, and its admissibility is challenged upon the ground that it was induced by threats or violence.

The evidence appears conclusive, and the counsel for the prisoners have admitted, that no threats were made, and no inducements were held out by Superintendent M'Kenna or in his presence at the time when the admission was made, but the prisoners' counsel contend that threats had previously been made by persons in authority, and that the onus rested upon the prosecution of proving that the alleged confession was not induced by these threats before evidence of the confession could be given to the jury. The evidence is as follows:—

When Bernard Treanor and Thomas Treanor were arrested, did the military bring them to your office? Yes; they were afterwards brought to Clones, because we had more men to guard them.

That is to say, the arrest was made by the military before the Civic Guards? There were no Civic Guards there at the time.

Do you remember which of them first came into your office? Bernard Treanor.

Bernard Treanor? Yes.

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Did you question him about anything? Yes.

Mr. Comyn K.C.: I object to the question. If it is intended to put in any supposed statements of the prisoners, I am in a position to prove that they were not voluntary statements, and you must prove that they were. The onus is on you.

MR. JUSTICE O'SHAUGHNESSY: I must rule each question. I cannot rule what the intention is. I am not going to rule your intention out, Mr. Carrigan, before I know what it is.

Mr. Carrigan K.C.: Bernard Treanor was brought into your office? Yes. And did you question him about any motor? Yes, I was satisfied ——

Did you question him about anything? I questioned him about a motor-car of Eddie Graham's, in Monaghan, that had been taken. He was a motor-driver, and that was the reason I questioned him.

What did he say?

Mr. Comyn K.C.: I object. My objection is this ——

Witness: He said he knew nothing about it. He then admitted ——

Mr. Comyn K.C. objected.

MR. JUSTICE O'SHAUGHNESSY: Put your question, Mr. Carrigan, and if it is illegal I will rule it.

Mr. Carrigan K.C.: My question was the innocent question, if he said he knew anything about a motor-car, and did he say anything else?

Mr. Comyn K.C.: Take my objection, and it is this: that this alleged statement must have been made after threats and intimidation and violence were used against the prisoners, and I am prepared to prove it.

MR. JUSTICE O'SHAUGHNESSY: I cannot exclude it if the witness says he used no threats.

Mr. Comyn K.C.: I am prepared to prove there were.

MR. JUSTICE O'SHAUGHNESSY: That will be another day's work.

Mr. Comyn K.C.: The onus is on the prosecution to prove that any statement he made is a voluntary statement. I have evidence to prove that, at the time he questioned Bernard Treanor, violent threats had been used, and intimidation had been used on the accused.

MR. JUSTICE O'SHAUGHNESSY: By the witness?

Mr. Comyn K.C.: By the witness and those under his command.

MR. JUSTICE O'SHAUGHNESSY: We must first of all deal with the witness here.

Mr. Comyn K.C.: What I submit now is that any statement made at that stage cannot have been a voluntary statement.

Mr. Carrigan K.C.: Absurd.

Mr. Comyn K.C.: And the reason is this—it is not legal because threats had been used, and I am prepared to prove that threats had been used for the purpose of extracting the statement.

MR. JUSTICE O'SHAUGHNESSY: That may be; but I must first find from the particular witness whether he used any threats or held out any inducement.

Mr. Comyn K.C.: It won't be evidence if I can prove threats; and, before the statement is given to the jury, I ought to be allowed an opportunity to prove that the threats had been used; and I cite for your Lordship a case in which your Lordship appeared.

Mr. Carrigan K.C.: A few minutes ago he told me that the statement was voluntary; and I will discharge that onus.

Mr. Comyn K.C.: My learned friend, Mr. Carrigan, proposes to give in evidence to the jury a statement made by the accused man, Bernard Treanor ——

MR. JUSTICE O'SHAUGHNESSY: To him?

Mr. Comyn K.C.: Yes.

MR. JUSTICE O'SHAUGHNESSY: Very well. If that statement was to him a voluntary statement, I must receive it. You may afterwards discount it if you can.

Mr. Comyn K.C.: Will you take my submission now?

MR. JUSTICE O'SHAUGHNESSY: The shorthand-writer is taking it.

Mr. Comyn K.C.: My submission is that the statement was not a

voluntary statement, and ought not at this stage to be repeated in the hearing of the jury, and for this reason: that, as regards the question whether or not it was a voluntary statement, the proof depends on witnesses, not merely on the statement of the witness in the box.

MR. JUSTICE O'SHAUGHNESSY: If that were so, you would take the onus instead of the State.

Mr. Comyn K.C.: My Lord, on the evidence as it stands, prima facie Mr. Carrigan has discharged the onus, because the witness in the chair says, "I used no threats."

MR. JUSTICE O'SHAUGHNESSY: He did not say that yet. [To the witness.] Did you use any threat or inducement of any kind to him? No, my Lord.

Mr. Comyn K.C.: Before the statement is permitted, I want to prove that threats and violence were used against this prisoner for the purpose of inducing him to make the statement ——

MR. JUSTICE O'SHAUGHNESSY: To this witness?

Mr. Comyn K.C.: To anybody, in relation to the offence charged. It doesn't matter whether it was that man.

MR. JUSTICE O'SHAUGHNESSY: I cannot follow that; but I will tell you this—if it afterwards transpires that the statement made to this witness was not a voluntary statement, I shall take good care not to let it go to the jury.

Mr. Comyn K.C.: The jury will have heard it, and that is not sufficient for me.

MR. JUSTICE O'SHAUGHNESSY: I cannot exclude legal evidence because the jury hear it. I think an intelligent City of Dublin jury will be able to delete such portions of the evidence as I may tell them.

Mr. Comyn K.C.: I submit authorities.

MR. JUSTICE O'SHAUGHNESSY: Give me the authorities.

Mr. Carrigan K.C.: Mr. Comyn has said that this statement is not to be received, because he submits it was produced by coercion and threats. Let him give the authority. He is now going to call up a witness to deny the evidence as given.

MR. JUSTICE O'SHAUGHNESSY: I will not allow it at this stage. Show me any authority.

Mr. Comyn K.C.: I first cite you the case of *R.* v. *Thompson* (1).

MR. JUSTICE O'SHAUGHNESSY: That case does not support your view, because, as I understand, this witness knows nothing about an inducement being held out.

Mr. Comyn K.C.: It is not necessary that threats or inducements should be held out by the person who actually receives the confession. They must prove the contrary. If that were the case, the bludgeoners could be in one room, and when a man had been bludgeoned sufficiently, he could be asked to make his statement.

[*Mr. Comyn K.C.* then quoted *R.* v. *Devine* (2), and added]: I now propose to tender evidence.

MR. JUSTICE O'SHAUGHNESSY: I will not hear it. Neither of the two cases you have cited supports this proposition. In the case of *R.* v. *Thompson* (1) it was as clear as daylight that it should not have been admitted.

Mr. Comyn K.C.: I think the evidence may be produced.

MR. JUSTICE O'SHAUGHNESSY: Produce it at the proper time; and I want to say this distinctly now—that if I am satisfied (and I understand, as the law stands, it is the Judge who determines this matter) that any threats were used, I will tell the jury to wipe out any confession.

Mr. Comyn K.C.: Having regard to the minds of men, that is hard on the prisoners.

MR. JUSTICE O'SHAUGHNESSY: It is impossible for me to exclude it.

Mr. Comyn K.C.: What I propose to prove is that it is the subordinate officers of these gentlemen who did it.

MR. JUSTICE O'SHAUGHNESSY: I have made a ruling now. [To the wit-

(1) [1893] 2 Q. B. 12. (2) 38 Ir. L. T. R. 227.

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ness:] You asked him no further questions, and held out no inducements to him? No inducement of any kind.

Or threat of any kind? No; and they knew me personally.

MR. JUSTICE O'SHAUGHNESSY: What? The prisoners knew me personally.

Did you know of any threat being held out to him? No, my Lord, none. They did not make any complaint to me, and I did not know of any. Without asking any further questions, Bernard Treanor said ——

Mr. Comyn K.C.: Did you hear a complaint being made? No.

Did you hear the men had been ill-treated? No.

Or that they were told to get ready; by 12 o'clock they would be in the next world? No.

Or anything of that kind? No.

No complaint of that kind was made to you? No.

Bernard Treanor then stated ——

MR. JUSTICE O'SHAUGHNESSY: Do you know Bernard Treanor well? Yes. I lived two miles away from him before I joined the army, and I know all the prisoners well. Bernard Treanor said, "I took part in the bank raids, and nothing else. We were acting under orders."

Mr. Carrigan K.C.: Did he say anything to you about money taken in these raids? I asked him where did the money go—"What did you do with the money?" He said it was given to the brigade quartermaster of their force—of the Irregulars. I asked him to give me the name of that person, and he said he would not.

Did he talk of any share of the money falling to other persons outside the quartermaster? Yes; he said, "All we got out of it was £5 each."

From this passage it appears clearly that the learned Judge was of opinion that evidence of a confession to a peace officer could be given, provided that the confession was not induced by any threat made, or inducement held out, by, or in the presence of the person to whom it was made. And that Mr. Comyn contended that if the confession was in fact induced by threats or promises made by any person in authority it was inadmissible, and he claimed the right to call witnesses for the purpose of proving that the confession was so induced, before its terms were disclosed to the jury.

At a later stage in the case, after the evidence of the confession by Bernard Treanor had been admitted, and the case for the prosecution had closed, Mr. Comyn proceeded to call evidence to prove violence and threats to the prisoners for whom he appeared, before the alleged confession, and the following colloquy took place:—

Mr. Comyn K.C.: We have two witnesses in respect of the ill-treatment.

MR. JUSTICE O'SHAUGHNESSY: The ill-treatment of whom?

Mr. Comyn K.C.: The ill-treatment of our prisoners before this alleged confession.

Mr. Carrigan K.C.: Substantive evidence is now being offered by two witnesses for the defence—that the evidence given by Inspector M'Kenna as to a statement made by Bernard Treanor to him should not have been received. Your Lordship will see the evidence of Inspector M'Kenna. He was cross-examined, and he denied that any threat, inducement, or violence was used, and the admission was accordingly made. I object to my friend putting up evidence to contradict what Inspector M'Kenna has said.

Mr. Comyn K.C.: My Lord, when the evidence of these alleged confessions was tendered by the learned counsel who represents the State here, I informed your Lordship that I had substantive evidence to prove that any

statements made or alleged to have been made by the accused men, or any of them, were made under the pressure and terror of threats and ill-treatment meted out to them immediately prior to the time of the alleged confession; and your Lordship said that, although you would not allow the substantive evidence to be given at that stage, you would take very good care to investigate it hereafter, and to allow me to produce my witnesses.

MR. JUSTICE O'SHAUGHNESSY: I never said that.

Mr. Comyn K.C.: You said you would tell the jury.

MR. JUSTICE O'SHAUGHNESSY: You read a number of authorities.

Mr. Comyn K.C.: Your Lordship stated—and I think it is correct law, if I may say so, with respect—that if I was able to show that threats, or intimidation, or ill-treatment had been used towards these prisoners with the object of inducing them to make any statement—if these things had been done by persons in authority — it vitiated the statement, and that your Lordship would tell the jury that they ought to disregard it altogether.

MR. JUSTICE O'SHAUGHNESSY: And I repeat that. That is not what you proposed to do. The witness that proved the statement stated that he uttered no threat; he knew of no threat, and never heard of a threat. You quoted a case to me in which it was decided that where a person received an admission, and knew it was produced by improper means, the admission was not evidence; but to say that you can give evidence *dehors* a particular individual would be an endless matter. I remember perfectly well that I gave an illustration to you when you sought to exclude this evidence—I gave the ordinary explanation. Take, for instance, the man who goes through religious duties, and is advised to make a clean breast of it by his instructor. Do you mean to tell me that the man who knows anything about that, and makes a statement afterwards, cannot prove it in Court?

Mr. Comyn K.C.: I never suggested anything of the kind; and I said on the former occasion that there is no parallel, because the evidence I propose to tender is this ——

MR. JUSTICE O'SHAUGHNESSY: You propose to introduce evidence to contradict on oath two witnesses—that is what you propose to do. You put to the credit of the witnesses a certain statement; and Inspector M'Kenna stated that he never heard of any threats.

Mr. Comyn K.C.: What I propose is to give evidence of threats and intimidation and inducements, if you like, immediately preceding the alleged confessions, and made by persons in authority, closely in association with Inspector M'Kenna. That is what I tender, and I tender two witnesses.

Mr. Carrigan K.C.: I would be sorry to take my friend at a disadvantage. I have never known this to happen before.

MR. JUSTICE O'SHAUGHNESSY: No, nor I; but at the same time, if it is within the region—I cannot lay down a precedent—it is a dangerous thing for a Judge to do; but if I can receive every bit of evidence without laying down any precedent, I would be anxious to do so.

Mr. Carrigan K.C.: To this extent ——

MR. JUSTICE O'SHAUGHNESSY: I know these authorities as well, perhaps, as most men; I know all these authorities upon admissions. There never was a case in which a person, to whom an admission was voluntarily made, could not give evidence of the admission—that is, when no inducement was held out or the person was not guilty of any impropriety; and it would be absurd if it were otherwise.

Mr. Carrigan K.C.: It stands this way: Inspector M'Kenna said that Bernard Treanor (months after this happening) was arrested by the military when he was a military officer; that he came into his office or was brought in alone and apart from his brother Thomas, and that he asked Bernard Treanor about a certain motor-car, and that Bernard Treanor denied any knowledge of that motor-car.

MR. JUSTICE O'SHAUGHNESSY: And he was quite right in asking that. That was a perfectly legitimate question.

Mr. Carrigan K.C.: And then, without his putting any question about the bank raid or saying anything to him about the bank raid, Bernard Treanor himself volunteered a statement about the bank raid.

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MR. JUSTICE O'SHAUGHNESSY: What Mr. Comyn suggests is that somebody else threatened him.

Mr. Comyn K.C.: Yes.

MR. JUSTICE O'SHAUGHNESSY: I object to lay this down as any principle; but if it is done by complete consent, so that it shall not be quoted to me again, or to any other Judge sitting here, following me, I would be satisfied. I am not violating the law.

Mr. Carrigan K.C.: Surely the evidence proposed to be given now must be confined at least to what was done by Inspector M'Kenna or by Captain John M'Kenna.

MR. JUSTICE O'SHAUGHNESSY: Certainly.

Mr. Carrigan K.C.: What was done by them in the presence of witnesses now going to be examined?

Mr. Comyn K.C.: Or other persons in immediate association.

MR. JUSTICE O'SHAUGHNESSY: I beg your pardon, I would not allow that at all.

Mr. Comyn K.C.: Very well; I will tender it.

Mr. Carrigan K.C.: "Or by other persons in immediate association" is very vague and uncertain. The witness may come up to the witness chair now, and if he speaks of what was said or done by either Inspector M'Kenna or Captain M'Kenna under the circumstances, I will not object in this case; but I do not agree, and I will object strongly to that witness coming up and saying that he was present while somebody, whose name I never heard of, and described as coming from the class of persons in immediate association with these officers, abused, threatened, or otherwise ill-used any of the prisoners, because I must have notice of that in fairness to the prosecution.

MR. JUSTICE O'SHAUGHNESSY: And in fairness to the persons charged.

Mr. Comyn K.C.: Haven't you two days' notice?

Mr. Carrigan K.C.: Shortly, I do not object in this case.

MR. JUSTICE O'SHAUGHNESSY: I will confine the evidence to what was done by the two officers or somebody at the immediate time. I am not doing this in point of law; I am doing it by consent, because it is not admissible.

This conclusively establishes the position adopted by the learned Judge, who allowed the evidence to be given, (though ruling it inadmissible), in order that it might not appear that he was straining the law in any way against the accused parties.

In the opinion of the Court the ruling of the learned Judge was incorrect in law, and the evidence was admissible for the purpose of proving threats inducing the alleged confession.

A confession made to any person under the influence of a promise or threat held out by a person in authority, calculated to induce the confession, is inadmissible, unless it be clearly proved to the satisfaction of the Judge, whose duty it is to decide the question, that the promise or threat did not operate upon the mind of the accused, and that the confession was voluntary notwithstanding, and that the accused was not influenced to make it by the previous promise or threat.

The Court is further of opinion that if evidence is tendered to prove the inadmissibility of evidence primâ facie admissible, it is the duty of the Judge to receive it, and to decide the question of admissibility, before the evidence is given in the hearing of the jury. The Court approves of and adopts the statement of the law upon this point by Baron Parke in *Bartlett* v. *Smith* (1), and the decision to the contrary of Lord

(1) 11 M. & W. 483.

Tenterden C.J. in *Jones* v. *Fort* (1), must be regarded as overruled, as indeed it appears to have been by *Boyle* v. *Wiseman* (2).

This procedure may be inconvenient, as Lord Tenterden suggests, but it is better that some inconvenience should be endured rather than that evidence should be given in the hearing of the jury which might, and probably would, affect their decision, no matter how emphatically they may be exhorted to expunge it from their recollections.

If, upon taking evidence to prove the inadmissibility of a statement already admitted subject to disallowance at a later stage, its inadmissibility were clearly established, the Judge would be bound to discharge the jury, or their verdict—if it might conceivably have been influenced by the illegal evidence—could not be permitted to stand. In the former alternative the public expense and inconvenience would be greater than if the question of admissibility had been first tried; and in the latter, justice might suffer from the discharge of a criminal who ought to have been convicted upon legal evidence already before the jury.

Having expressed its opinion upon the procedure to be adopted in similar cases, the Court will now consider the effect of the evidence actually admitted in the present case. Captain John M'Kenna, in whose custody the prisoners were before the admission was made to Superintendent James M'Kenna by Bernard Treanor, positively denied that any threat was made or inducement held out by him or by anyone under him which could have induced the subsequent confession. The only admission extracted from him was as follows:—

> So that you were reproaching him? When he said he was at the bank robbery, I said: "You would work in that, and you would not drive a car for the taking of Ballytrain Barracks?"
>
> At the taking of a barracks somewhere else? In 1917.
>
> When it was a proper thing to take barracks? Did Houston say he would be back again? Houston didn't take any part in it at all.

And this could not have induced any admission by any of the prisoners.

But when the case for the defence was opened, two witnesses were called who gave very material testimony. In Kearney's evidence we find the following:—

> Can you fix the date? The evening of the 23rd of October.
>
> What year? 1922.
>
> Who were brought into the school-room? Thomas Treanor, Bernard Treanor, and two others.
>
> MR. JUSTICE O'SHAUGHNESSY: Who were there? One was M'Kenna; I didn't know the other party; I didn't make any inquiries.
>
> Which of the M'Kennas? He was the prisoner M'Kenna.
>
> *Mr. Black*: Were you confined in the school-room for some time? Yes.
>
> On that evening of the 23rd of October? Yes.

(1) Moo. & M. 196. (2) 11 Exch. 360.

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Now, what happened? Well, about seven o'clock in the evening ——

MR. JUSTICE O'SHAUGHNESSY: I cannot allow it to be put in this way.

Mr. Black: Did anybody come into the room?

MR. JUSTICE O'SHAUGHNESSY: Name the prisoner.

Mr. Black: Who came into the room? Prisoners and military. Thomas Treanor and Bernard Treanor came into the room, followed by a number of military—privates and officers.

Did you know any of the officers? Yes.

Who were they? Captain John M'Kenna, Lieutenant Houston, Lieutenant Gabbin, and, I think, Captain M'Gonnell.

Who? Captain M'Gonnell, Houston, Captain John M'Kenna, and Gabbin.

Did they proceed to say anything to the prisoners? They were pushed through the door.

Who were they? The prisoners (referring to Thomas and Bernard Treanor), and I am not dealing with the other two. They were pushed through the door. John M'Kenna said: "You can swank it now with your bags after robbing the bank," and "Why didn't you go over the border and rob the banks there, and shoot the specials?" Then, of course, during M'Kenna's presence, the other officers threatened him.

Threatened him? Yes.

MR. JUSTICE O'SHAUGHNESSY: What did they say? Lieutenant Houston said, "If you don't tell us who robbed the banks and shot Gillanders before twelve o'clock, we will plug you."

Mr. Black: It was Houston said that? Yes, in the presence of John M'Kenna.

John M'Kenna was there? Yes.

Captain John M'Kenna was there? Yes. After some time they went out, brought in beds, and asked them were they ready, and for them to make an act of contrition.

Mr. Carrigan K.C.: Who said this? Lieutenant Houston again.

In whose presence? In the presence of the same officers.

Mr. Black: Lieutenant Houston said that the prisoners—the Treanors—were to make an act of contrition? Yes, that he would carry out his threat. These are the words he used, as far as I can remember; also Volunteer Coleman (as far as I could find out his name afterwards). He threatened Bernard Treanor.

What did he say? He said something similar; he said they would carry out what they had said, as far as I can remember.

Did they ask any questions? Houston said, "You were not very much good" (as far as I can remember, it was he who said it, but I would not be sure) "when the Ballytrain Barracks were being attacked;" and he said, "I did as much as anybody else. I drove the car," or words to that effect.

Barney Treanor said that? Yes.

Did the two Treanors appear to be frightened? James Treanor appeared to be the most nervous of the two.

Did they appear to be frightened? Yes, he was nervous.

Was there anything said about executions?

MR. JUSTICE O'SHAUGHNESSY: Really, I will not allow suggestions to be made.

Mr. Black: To make an act of contrition? Yes.

There is no doubt about it that there was a statement made that he was to make an act of contrition? Yes.

In the evidence of John Lee the following passage occurs:—

Would you tell my Lord and the jury the names of them (i.e. of the military who came into the room where the prisoners were)? Lieutenant Houston was one; Captain M'Kenna was another. There was another man, of the name of Coleman; I do not know his rank.

And, in addition to these, there were soldiers? Yes.

You heard the last witness giving his evidence? Yes.

Is it true? Yes.

Better go into it in detail, I suppose?

Mr. Carrigan K.C.: Not unless you choose.

Tell my Lord and the jury what you saw. The prisoners were shoved in through the door of the detention room roughly, and some of the officers made threats and remarks towards them.

Tell what were the threats and what were the remarks. Captain M'Kenna made reference to Bernard Treanor—that he was a great man now, and that he would not go to Ballytrain the night the barracks were attacked. Treanor said he was as good a man as him, that he did anything that he was asked to do, and that he was only a private Volunteer at that time.

Was there anything said about the raid on the Monaghan bank? Yes, there was a reference made to the raids on the banks.

Tell my Lord what it was. There was a reference made that the Treanors could swank it with their bags after the raid on the bank.

Did you hear anything about twelve o'clock at night or anything like that? Yes, they were threatened; Lieutenant Houston threatened them.

Was that in the presence of Captain M'Kenna? Yes, he was present.

What was the threat? He told them to prepare, that before twelve o'clock their pudding would be cooked.

Did you understand what that meant? I did not understand it myself. I thought it might be that they would go to shoot him, or something like that, or abuse him.

Their "pudding would be cooked" anyhow? Yes.

Did you hear anything about prayers? They were told to make an act of contrition.

Before the cooking of the pudding? The very thing.

In what condition were the prisoners after this interview? Both of them seemed frightened.

Did you see the prisoners on the following day? Yes.

In what condition were they? They were worried looking.

Cross-examined by *Mr. Carrigan K.C.*:

They were worried looking on the following day? Yes; we were all the same.

MR. JUSTICE O'SHAUGHNESSY: Were you worried looking too? There wasn't any looking-glass there that I could see myself in.

Mr. Carrigan K.C.: But you could imagine yourself looking worried like the rest? Yes.

. . . . . .

Now, I understand that this night, when the prisoners and one or two other men were arrested, the first thing you observed was that they were roughly hustled into the room? Yes.

. . . . . .

The next thing was that somebody said, "You can swank it now after robbing the banks"? Yes; Captain M'Kenna said it.

Deriding the man—"You can swank it with your bags now"? Yes.

Would you call that a threat? I might not call it a threat. You would call it a "nag."

A snag or a nag? Yes.

Something derisive? Yes.

"You can swank it now with the money bags"? Yes, a dry remark.

And was that the worst that Captain M'Kenna said? There were so many of them in it, and they were all talking at the one time.

You remember him making that observation? Yes.

And after that he reminded one of the prisoners that he had not been at the attack on a barracks? Yes.

That was a sort of taunt; is not that how you understood it? Would you say that that was a threat? It is not for me to decide.

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THE STATE *v.* TREANOR AND OTHERS.

FitzGibbon J.

Oh! yes, it is, because you were listening. Did you take it to be a threat by Captain M'Kenna to say that (although he was a prisoner) "You can swank it with money bags; you were not much of a man at the time of the attack on some barracks"? Is that a threat; would you consider that a threat? It was not a very severe one anyhow.

But it was a threat? It was.

You would take that to be a threat? Yes.

. . . . . .

And it was somebody named Houston who used the threat? Yes.

The threat, as you heard Houston express it, was: "Before twelve o'clock your pudding will be cooked"? Yes.

And a phrase of that kind conveyed nothing to you? He also told him to make an act of contrition.

At the same time? Yes.

Repeat to the jury exactly what he said. He told them to make an act of contrition, that they would be back in ten minutes or fifteen. They came back inside of that time, but they did not carry out their threats.

When was the mention of the "pudding"? In the first instance.

How did they introduce the pudding as part of the menu; how did it happen? No reply.

What did Lieutenant Houston say? What was his opening remark that led to the mention of the "pudding"? They made reference to the raid on the bank and the shooting of Lieutenant Gillanders.

Say what he said as well as you can remember; tell the jury what Lieutenant Houston said. He said they would be back in ten minutes, and to prepare.

What was said about the pudding? He said their pudding was cooked, and that they would be back in ten minutes.

Didn't you tell me yourself that the mention of a pudding did not convey to your innocent mind any threat at all; isn't that what you said? No reply.

Didn't you say that to Mr. Comyn a moment ago—that you didn't understand this reference to a pudding? No reply.

These men were not rough-handled in any way? No.

They were hustled in? Yes.

And then this taunting remark was made by Captain John M'Kenna? Yes.

And then Houston said, "Your pudding will be cooked in ten minutes"? Yes.

And to prepare to make an act of contrition? Yes.

Was it after saying that that they went out and came back? Yes.

MR. JUSTICE O'SHAUGHNESSY: Who went out? The officers and men.

Mr. Carrigan K.C.: They retired? Yes.

When they did retire, you were there in the company of the Treanors? Yes.

What passed between yourself and the Treanors? We had not much conversation amongst each other. They were strangers to us, and we did not talk very much to them.

You must remember, because this was an incident in one's life. You had only been arrested six days before, and now you heard this allusion to a pudding that was to be prepared in ten minutes, and a request made by somebody that an act of contrition might be made? They seemed very frightened, and they asked us did we think they would carry out their threats.

What did you say? We said we did not know at the time whether they would or not.

What threats? About the making of the act of contrition; that they would be back in ten minutes. When a man is told to make an act of contrition, he is preparing for something, naturally enough.

But they didn't make an act of contrition? They might have made it, and we could not hear them.

But, as far as you know, they did not make any public act of contrition? No.

Or make any preparation to meet the pudding? No.

MR. JUSTICE O'SHAUGHNESSY: Did you say that you did not understand the cooking of the pudding to be a threat? Yes, I said that.

Mr. Carrigan K.C.: It was the act of contrition that frightened you? No.

You were a bit frightened? I was not told to make an act of contrition.

As far as you can remember, in the presence of the jury, these men had no choice, according to the way you put it, but to make an act of contrition inside ten minutes? That is what they were told anyhow.

To be ready—to make an act of contrition? Yes.

Was there anything said about the bank that time? Yes.

What was said about the bank raid besides the taunting reference made by Captain M'Kenna to swanking it with bags? That was the only reference made to it.

Did Houston come back at all? No.

The man who was to present the pudding? No.

Did Captain M'Kenna appear? I did not see him after.

He didn't come back after; do you know did he appear? They came in with some bedding for the prisoners afterwards.

Do you mean to say that, in execution of the threat, they brought in bedding to enable these men to lie as comfortably as they might, you and the rest of you in the school-house? Yes.

Are you serious? They came back with bedding for the men.

Bedding, mattresses, and blankets? Yes.

And did they lay them down for you and the other prisoners? Yes, they were left there for us all.

And is that the worst that happened? That was all.

Thereupon Mr. Comyn repeated his objection to the admissibility of the confession, and it was ruled upon as follows:—

Mr. Comyn K.C.: I formally ask your Lordship to direct the jury that all these alleged confessions should be excluded from their minds.

MR. JUSTICE O'SHAUGHNESSY: On the contrary, I am very glad this evidence was given. It was given by consent of the counsel, and I have not made any ruling upon it, and I am glad the whole facts are out before the jury. I understood that these men were threatened with revolvers, and that rifles were pointed at them; and it now turns out to have been a taunting conversation between a number of these men, which the last witness did not understand at all. I will not exclude it. I was rather inclined, and probably would have, had I not heard this evidence; I would have excluded the evidence of Captain M'Kenna.

Mr. Comyn K.C.: I ask you to exclude Captain M'Kenna's evidence on another ground altogether, that he himself in his own evidence stated that he said Bernard Treanor said that he was there: "You better tell it all out."

Mr. Carrigan K.C.: I do not want to have any contention with my friend. If he thinks that was the way it was put, I will let it pass.

MR. JUSTICE O'SHAUGHNESSY: I won't exclude it from the jury for the purpose of showing that the statements made here with reference to him are untrue, because he has sworn they are not true. In no circumstances would I exclude it for that purpose. I will deal with it in the proper time.

Mr. Comyn K.C.: It was on another ground altogether.

If the learned Judge had taken the evidence of these two witnesses before he had admitted the alleged confession by Bernard Treanor, and had definitely ruled either that no threats were used at all, disbelieving the two witnesses, whose credibility was a question for him, or that the effect of the threats, whatever

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they were, had worn off before the confession was made, or had not induced it at all, our task would have been simplified, but the Court cannot find that the learned Judge ever made a definite decision upon either of these points. He does not appear to have receded from the position originally taken up by him that threats made, or inducements held out, except by or in the presence of the persons to whom the confession was made, were irrelevant to the question of the admissibility of the confession, and to the end of the summing-up he treated the evidence of Lee and Kearney as inadmissible, except as going to the credit of Captain John M'Kenna, not as affecting the admissibility of the subsequent confession to Supt. James M'Kenna.

If the testimony of Kearney and Lee be even partially true, threats were made to the prisoners, which might have influenced Bernard Treanor to admit the crime of bank robbery either in the hope that he would get off more lightly or to exonerate himself from complicity in the murder of Lieut. Gillanders; and this Court is not satisfied that no threats of the kind described were made, or that if made, their effect had disappeared before the interview with Superintendent M'Kenna at which Bernard Treanor admitted that he had taken part in the raid upon the bank. It follows, therefore, that the evidence of the confession should not have been admitted, and as it is not clear that the jury must have convicted Bernard Treanor upon the evidence apart from his confession, the verdict of guilty in his case must be set aside.

The case against Patrick Kelly, and his appeal against his conviction, are quite distinct from those of the Treanors and Flood. The indictment was for an armed assault upon two officials of the Hibernian Bank and stealing £450, the moneys of the bank. The evidence against Patrick Kelly proved that he was in the town of Monaghan at or about the time when the bank was raided, that he left the town upon a bicycle while the raid was in progress or shortly afterwards, that he disappeared from his home for some time, and that on the day after the raid he paid a debt of £50, with a number of bank notes which included two £10 notes which had been stolen on the previous day by armed men from the Monaghan branch of the Provincial Bank. It was proved that the £450 taken from the Hibernian Bank was all in silver, and that the notes traced to Kelly were taken from the Provincial Bank.

The contention of the prosecutors before this Court was that the evidence established a common design by all the accused, with other persons, to raid all the banks in Monaghan, and to make an attack upon the Court-house in which the military were stationed to enable the bank raid to be carried out without interference, and that accordingly proof that Kelly was engaged, either in attacking the Court-house or in raiding some other bank, would sustain an indictment against him for robbing the Hibernian Bank. They further contended that the possession

by Kelly of notes recently stolen from the Provincial Bank was evidence upon which he might have been convicted of robbing that bank, and so of having been party to the alleged design of robbing all banks including that charged in the indictment, and that, therefore, he was properly convicted of stealing £450 in silver from the Hibernian Bank.

It is to be observed that the charge is of robbing a single bank, and that no direct evidence of the alleged common design was offered by the prosecution, who left it to be inferred from somewhat vague references in the evidence and from the facts that the Court-house was attacked and the Provincial Bank was robbed while the robbery charged was perpetrated at the Hibernian Bank. The summing-up of the learned Judge contains no advice to the jury upon the necessity for connecting the offence proved against Kelly with the wholly different crime charged in the indictment, although Mr. Comyn, at the close of the charge, made an objection specifically directed to this point. The possession of recently stolen property, for which no satisfactory explanation is given, is evidence from which a jury may find that the person upon whom it is found stole it, but it will also justify a conviction for receiving only, and the conviction is founded upon the presumption of guilt arising from a failure to account for the possession. But upon an indictment for stealing £450 of silver the property of *A*, the possession of bank notes recently stolen from *B*, is not necessarily evidence of guilt, and when, as in the present case, the prosecution seeks to establish, not a conspiracy to rob several banks, but a constructive robbery of one by assisting in the robbery of another, this Court is of opinion that the grounds upon which Kelly might have been convicted of the charge laid in the indictment should have been very carefully expounded to the jury, and they should have been warned that if they considered upon the evidence that Kelly, who was not actually identified as having been present at any bank or with the raiding party, and upon whom no arms were seen or found, was in fact only a receiver of stolen property without previous participation in the robbery, they should not convict him even of stealing from the Provincial Bank, still less of the constructive robbery of the Hibernian Bank.

The Court is of opinion that the jury did not receive such instructions in the case of Patrick Kelly as would enable them to appreciate the bearing of the evidence upon the charge, and that the conviction in his case must be set aside.

There is no ground for interfering with the verdict against Charles Flood or Thomas Treanor, and the appeals by them, respectively, are dismissed. The appeals by Bernard Treanor and Patrick Kelly are allowed and the verdicts and judgments against them are reversed.

Solicitor for the State: *The Chief State Solicitor.*
Solicitor for the prisoners: *Daniel X. Keenan.*

H. J. M'C.

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PATRICK MURPHY *v.* EDWARD WALSH.

Practice—Civil bill decree—Certiorari to remove into High Court—Certiorari not now necessary—Civil bill decree having the effect of a judgment of the Circuit Court—Enforcement of judgment of Circuit Court as a judgment of High Court—Civil Bill Courts Procedure Amendment Act (Ir.), 1864 (27 & 28 Vict. c. 99), sect. 9—Courts of Justice Act, 1924 (No. 10 of 1924), sects. 21, 51, 60.

An application for a writ of certiorari to remove a decree of a County Court into the High Court under the Civil Bill Courts Procedure Amendment Act (Ir.), 1864, in the Irish Free State, was refused as unnecessary.

Such a decree now has the force and effect of a judgment of the Circuit Court, which may be enforced in any part of the Irish Free State in any of the modes in which a like judgment or order of the High Court might be enforced.

EX PARTE application to the Vacation Judge.

The plaintiff applied for a writ of certiorari to remove a civil bill decree into the High Court. The decree was for £31 13s. 5d. in respect of work done and materials supplied, and £2 18s. costs, and was given at Tralee on the 11th June, 1924, by the County Court Judge for the County of Kerry.

Gavan Duffy, for the applicant:—

There is no provision in the Courts of Justice Act, 1924, dispensing with the necessity for certiorari when it is desired to make a County Court decree effective against land; nor anything to make a County Court decree equivalent to the decree of a Circuit Court for the purposes of sect. 60 of the Courts of Justice Act, 1924 (1). The applicant requires to have his decree (equivalent to a judgment) "perfected," as provided for in the first part of sect. 21 of that Act (2), that section being applicable only

(1) Courts of Justice Act, 1924, sect. 60:—". . . Any judgment or order of the Circuit Court may be enforced in any part of Saorstát Éireann in any of the modes in which a like judgment or order of the High Court might be enforced."

(2) Sect. 21:—"From and after the commencement of this Act the several jurisdictions which by this Act are transferred to the High Court, and the Supreme Court, and the Chief Justice, shall cease to be exercised except by the High Court and the Supreme Court and the Chief Justice respectively: Provided that in all proceedings which shall have been fully heard but in which judgment shall not have been given, or having been given shall not have been perfected at the time appointed for the commencement of this Act, such judgment may be given and perfected respectively after the commencement of this Act, in the name of the same court and of the same judges and officers and generally in the same manner as if this Act had not passed; and such judgment shall take effect as if it had been duly perfected before the commencement of this Act, and every order of any

under the terms of sect. 51 of the Act (1).

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MURNAGHAN J.:—

There have been several of these applications, and the practice is to refuse them as being unnecessary, in view of the terms of the Courts of Justice Act, 1924. Under sect. 51 and under sect. 21, which is applied by sect. 51, a decree of the old Civil Bill Court has the force and effect of a judgment of the new Circuit Court. There cannot be two kinds of Circuit Court judgments, one requiring, and the other not requiring, certiorari. No Circuit Court judgment requires a writ of certiorari to give it the force and effect of a High Court judgment, because under sect. 60 of that Act such a judgment may be enforced in any part of Saorstát Éireann in any of the modes in which a like judgment or order of the High Court might be enforced. I must therefore refuse this application.

Solicitor for applicant: *D. J. Brown.*

H. H.

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court or judge whose jurisdiction is hereby transferred to the High Court or to the Supreme Court or to the Chief Justice (which order shall have been duly perfected at any time before the commencement of this Act) may be executed and enforced, and, if necessary, amended or discharged by the High Court and the Supreme Court and the Chief Justice respectively, in the same manner as if it had been an order of the High Court or of the Supreme Court or of the Chief Justice and all proceedings whether civil or criminal which shall be pending in the courts, whose jurisdiction is so transferred as aforesaid, at the commencement of this Act shall (save as otherwise expressly provided by this Act) be continued as follows, that is to say, in case of proceedings on appeal pending in the existing Court of Appeal, the same shall be continued before the Supreme Court, and in case of all other proceedings (save proceedings in matters hereinbefore transferred to the Chief Justice) the same shall be continued before the High Court, and in case of all proceedings in matters hereinbefore transferred to the Chief Justice the same shall be continued before the Chief Justice. The said courts and the Chief Justice respectively shall have the same jurisdiction in relation to all such proceedings as if such proceedings had been commenced before them respectively and continued before them respectively down to the point at which the transfer takes place, and so far as relates to the manner of procedure such proceedings or any of them may be continued either in the same or the like manner as they would have been continued, in the respective courts from which they shall have been transferred, as aforesaid, or according to the course of the respective courts to which they shall be transferred, so far as the same be applicable thereto."

(1) Sect. 51: —"There shall be transferred to the Circuit Court all jurisdiction not hereinbefore expressly excepted which, at the commencement of this Act, was vested in or capable of being exercised by Recorders, County Court Judges, and Chairmen and Courts of Quarter Sessions, or any of the same in Saorstát Éireann (save such jurisdiction of Justices at or of Courts of Quarter Sessions as is hereinafter conferred on or transferred to the District Court) and the provisions of Sections 21 and 22 of this Act shall apply mutatis mutandis to the jurisdiction vested in and transferred to the Circuit Court by this Act."

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BANKRUPTCY — ACT OF BANKRUPTCY — DEBTOR SUMMONS — LATE SERVICE *of summons — Order* 88, *rule* 19 — *Application to annul bankruptcy — Principles applicable — Irish Bankrupt and Insolvent Act,* 1857 (20 & 21 *Vict. c.* 60), *sect.* 358.] On the 6th September, 1922, a debtor summons was issued against the bankrupt, and the summons was personally served on the bankrupt on the 29th September, i.e. two days too late under Order 88, r. 19, of the Rules of the Supreme Court of Judicature. No cause was shown against the adjudication, but the bankrupt applied to annul the bankruptcy on the ground that the late service of the debtor summons vitiated the proceedings. *Held,* that the condition of bankruptcy prior to the filing of a petition necessarily involved an act of bankruptcy, which the Court should assume was a proper ground for the adjudication. *Re Gorham*
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BANKRUPTCY— PREFERENTIAL DEBT — CROWN DEBT—INCOME TAX—*Priority—Preferential payments in — Bankruptcy (Ir.) Act,* 1889 (52 & 53 *Vict. c.* 60).] O. was adjudicated a bankrupt in March, 1923, and in the course of the bankruptcy the Commissioners of Inland Revenue claimed £25 15s. 4d. due to them by the bankrupt for income tax. The Registrar in Bankruptcy admitted the Commissioners as preferential creditors for the sum of £13 15s. 8d., being the largest of the three years' assessments due to them, namely, for the year 1921–22, and as unsecured creditors for the balance, £11 19s. 8d., ranking with the other creditors. Upon motion to review the ruling of the Registrar as to the balance: *Held* by Wilson J., that the Crown debt for balance of income tax was entitled to priority over the general creditors of the bankrupt. *In re Galvin, a Bankrupt* ([1897] 1 I.R. 520), followed. *In re Orr* K.B.D. (BANK.), N.I. 120

BANKRUPTCY — REPUTED OWNERSHIP — *Hiring agreement — Option to purchase—Trade custom—Irish Bankrupt and Insolvent Act,* 1857 (20 & 21 *Vict. c.* 60), *sect.* 313.] Two hearses and one funeral-coach were in the possession of an undertaker under a hire purchase agreement, which provided that the hirer should pay to the owners a deposit of £515, and the balance by instalments of £125 per quarter, until the full amount of the purchase, £1,015, was paid, when the carriages should become the property of the hirer; but until the full amount was paid they should remain the property of the owners. The owners were to be entitled to take possession should the hirer make default in the performance of any part of the agreement, or become bankrupt or insolvent. The deposit of £515 was paid, but no instalments, and the hirer was adjudicated bankrupt on 10th March, 1923, the carriages being then in her possession. On motion by the owners to

BANKRUPTCY—*continued.*

have the carriages delivered up to them: *Held* by the Court of Appeal, N.I. (Moore L.J. and Andrews L.J.), reversing the decision of Wilson J., that there was such a notorious trade custom of hiring such carriages as excluded the reputation of ownership, and that the owners were entitled to the return of the carriages. *In re Torrens, a Bankrupt*
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1. CERTIORARI—District Justice—Excess of jurisdiction — *Irregularity of record—Evidence—Improper admission—Essentials of justice—District Justices (Temporary Provisions) Act,* 1923 (*I.F.S., No.* 6 *of* 1923)—*Public Safety (Emergency Powers) Act,* 1923 (*I.F.S., No.* 28 *of* 1923)—*Public Safety (Emergency Powers) (No.* 2) *Act,* 1923 (*I.F.S., No.* 29 *of* 1923)—*Adaptation of Enactments Act,* 1922 (*I.F.S., No.* 2 *of* 1922)—*Larceny Act,* 1916 (6 & 7 *Geo.* 5, *c.* 50)—*Misleading variance between charge and conviction—Amendment not allowed*—40 & 41 *Vict. c.* 56, *s.* 76.] Two persons (E. and C.) were charged on a joint charge before a District Justice with an offence under the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50). The Justice refused the application of one of the prisoners (E.) to have the case sent for trial by a jury and depositions taken; permitted one of the prisoners (C.) to give evidence on the joint charge before discharge; and without any alteration of the charge as laid, convicted the other prisoner (E.) of an offence only triable on indictment. *Held,* that the District Justice, in convicting the prisoner (E.) of an offence which could only be tried on indictment, acted without and in excess of jurisdiction; that the proceedings were irregular, as one of the prisoners was permitted to give evidence on the joint charge before discharge; and that the District Justice misdirected himself in law in refusing to send the case for trial by a jury and to have depositions taken, and in stating that the prosecutor had the option to have the case tried summarily. The order being bad on its face, it was ordered that the writ of certiorari should issue and the conviction be quashed. *Held,* per Samuels J., that, even if the Court upon application for certiorari had power to amend a variance between a charge and the conviction thereon, that amendment should not be made, inasmuch as the defendant might

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2. CERTIORARI — DRAINS—ORDER OF JUSTICES AUTHORIZING ENTRY ON LANDS TO MAKE—*Decision of Justices that the lands are not an orchard not conclusive—Right of entry not limited to a definite time—Validity—Jurisdiction of Court of Appeal in Northern Ireland. Grand Jury* (*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116).] An order made under sect. 162 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), by which Justices had authorized drains to be made by the county surveyor, was quashed on certiorari by the King's Bench Division, on the ground that the proposed drains would draw off water from a lake rather than from a flooded road, and were works not contemplated by the statute. The order for certiorari was affirmed by the Court of Appeal, that Court holding on the evidence that the land through which the drains were to be made constituted an orchard within the exception to sect. 162. Where the jurisdiction of an inferior Court depends upon a fact collateral to the actual matter which that Court has to try, it cannot by a wrong decision with regard to that fact give itself jurisdiction which it would not otherwise possess. The lower Court must decide as to the collateral fact in the first instance, but the superior Court may upon certiorari inquire into the correctness of that decision. *Rex* (*de Vesci*) v. *Justices of Queen's County* ([1908] 2 I.R. 285) and *Rex* v. *Bradford* ([1908] 1 K.B. 365) approved. *Rex* (*Darcy*) v. *The Justices of County Carlow* ([1916] 2 I.R. 313) disapproved. An order of Justices authorizing a county surveyor to enter upon lands for the purpose of making drains is not bad on its face, because it does not specify a definite time limit. *Reg.* (*Bentham*) v. *Justices of County Dublin* (14 L.R.I. 443) overruled. *Rex* v. *Adams* ([1923] 1 K.B. 415) followed. The Court of Appeal of Northern Ireland has jurisdiction to reconsider decisions of the late Supreme Court of Appeal in Ireland, but this jurisdiction should be sparingly exercised. *R.* (*Greenaway*) v. *Armagh Justices* APP. (N.I.) 55

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in the Recorder's Court for payment thereof; and the Recorder, having joined the County Council and adjourned the hearing, ultimately gave a decree for £25, and struck the County Council's name out of the process. From this decree the Corporation appealed, and Dodd J. affirmed the decree as against both defendants without determining the proportions for which the defendants were liable inter se. Another half-year's salary having accrued due up to the 30th June, 1920, H. issued the civil bill in the present action, claiming payment thereof; and the Recorder made a decree in his favour against both defendants for a sum of £25 and costs. *Held* by the Court of Appeal, N. I. (Sir Denis Henry, Bart., C.J., and Wilson J.), on a case stated, that the decree should be affirmed against the Corporation of Londonderry alone, the County Council of Londonderry having paid the sum for which it was liable. *Londonderry Corporation and Londonderry County Council* v. *Hunter*

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CRIMINAL APPEALS — ADMISSION OF EVIDENCE — CONFESSION INDUCED BY THREATS — *Confession not made to the person using threats—Inadmissibility of confession—Duty of Judge when evidence tendered in order to prove inadmissibility — Discharge of jury or setting aside their verdict — Common design by several persons to rob banks—No direct evidence of common design — Evidence sufficient to sustain conviction for robbery—Constructive robbery of one bank by assisting at the robbery of another — Insufficiency of Judge's summing-up — No advice to jury as to connecting offence proved with different crime charged in indictment—Setting aside conviction.*] A confession made to any person under the influence of a promise or threat held out by a person in authority, calculated to induce the confession, is inadmissible, unless it be clearly proved to the satisfaction of the Judge (whose duty it is to decide the question), that the promise or threat did not operate upon the mind of the accused, and that the confession was voluntary notwithstanding, and that the accused was not influenced to make it by the previous promise or threat. If evidence be tendered to prove the inadmissibility of evidence prima facie admissible, it is the duty of the Judge to receive it, and to decide the question of admissibility, before the evidence is given in the

hearing of the jury. Judgment of Parke B. in *Bartlett* v. *Smith*, 11 M. & W. 483, approved, and judgment of Lord Tenterden C.J. in *Jones* v. *Fort*, Moo. & M. 196, held to have been overruled by *Boyle* v. *Wiseman*, 11 Ex. 360. If, upon taking evidence to prove the inadmissibility of a statement already admitted subject to disallowance at a later stage, its inadmissibility were clearly established, the Judge would be bound to discharge the jury, or their verdict—if it might conceivably have been influenced by the illegal evidence—could not be permitted to stand. The four appellants were convicted of having, while armed, made an assault upon officials of the H. Bank at Monaghan, and of having feloniously stolen a sum of money, the property of the bank, and all of them were sentenced to terms of penal servitude. The trial Judge having refused a certificate, in the case of each appellant, that the case was a fit case for appeal, each of them appealed to the Court of Criminal Appeal under sect. 31 of the Courts of Justice Act, 1924 (No. 10 of 1924), on the ground that certain confessions alleged to have been made by two of the appellants were wrongly admitted, and also on the ground of misdirection by the trial Judge in charging the jury. The four appeals were heard together.

1. THE STATE *v.* BERNARD TREANOR:— In this case evidence was given of a confession alleged to have been made by the appellant to one person in consequence of threats made by another person in authority, and the trial Judge was of opinion that threats made except by or in the presence of the person to whom the confession was made were irrelevant to the question of the admissibility of the confession. The Court of Criminal Appeal *held* this opinion to be erroneous. And, as the Court was not satisfied that no threats were made to the appellant, or that, if made, the effect of them had disappeared before the interview took place at which the appellant made the confession, the Court *held* that the evidence of the confession should not have been admitted. And, as it was not clear that the jury must have convicted the appellant upon the evidence apart from his confession, the verdict was set aside and the appeal allowed.

2. THE STATE *v.* THOMAS TREANOR:— In this case an alleged confession by the appellant was elicited by his counsel in the cross-examination of a witness. It was not volunteered by

CRIMINAL APPEALS—*con.*
the witness or obtruded in an irrelevant manner, but was elicited in an attempt to prove that no statement had been made, and the Court of Criminal Appeal *held* that it was properly admitted, and the appeal was, therefore, dismissed.

3. THE STATE *v.* PATRICK KELLY:—In this case it was contended for the prosecution that the evidence established a common design by all the appellants, with other persons, to raid all the banks in Monaghan, and to make an attack upon the Court-house (where the military were) to enable the raid on the H. Bank to be carried out without interference, and that, accordingly, proof that the appellant was engaged, either in attacking the Court-house or in raiding some other bank would sustain an indictment against him for robbing the H. Bank. It was also contended that the possession by the appellant of notes recently stolen from another bank (the P. Bank) was evidence upon which he might have been convicted of robbing that bank, and so of having been party to the alleged design of robbing all banks, including that charged in the indictment (the H. Bank), and that, therefore, he was properly convicted of stealing the money from the H. Bank. No direct evidence of the common design was offered by the prosecution, but it was left to be inferred from vague references in the evidence. The summing-up of the trial Judge contained no advice to the jury upon the necessity for connecting the offence proved against the appellant with the different crime charged in the indictment. The Court of Criminal Appeal *held* that, as the prosecution sought to establish, not a conspiracy to rob several banks, but a constructive robbery of one by assisting in the robbery of another, the grounds upon which the appellant might have been convicted of the charge laid in the indictment should have been very carefully expounded to the jury, and they should have been warned that if they considered that the appellant (who was not actually identified as having been present at any bank or with the raiding party, and upon whom no arms were seen or found) was in fact only a receiver of stolen property without previous participation in the robbery, they should not convict him even of stealing from the P. Bank, still less of the constructive robbery of the H. Bank. As the Court were of opinion that the jury did not receive such instructions as

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would enable them to appreciate the bearing of the evidence upon the charge, the conviction of the appellant was set aside and the appeal allowed.

4. THE STATE *v.* CHARLES FLOOD:—In this case the Court of Criminal Appeal *held* there was no ground for interfering with the verdict, and the appeal was dismissed. It is not the duty of the Court of Criminal Appeal to scrutinize the summing-up of the trial Judge for trifling misstatements in the evidence. Each of the appellants, as one ground of appeal, alleged misdirection on the part of the trial Judge in telling the jury in the course of his charge that all the appellants disappeared after the raid. The Court of Criminal Appeal, upon a consideration of the summing-up and the evidence upon which it was based, *held* that, on this point, there was no misdirection which would entitle the appellants, or any one of them, to have the convictions set aside. *The State* v. *Thomas Treanor; The State* v. *Charles Flood; The State* v. *Bernard Treanor;* and *The State* v. *Patrick Kelly* CT. OF CR. APP. 193

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HABEAS CORPUS—POWER OF THE OIREACHTAS TO AUTHORIZE THE DETENTION OF UNTRIED PERSONS—*Liberty of the subject—Constitution of the Irish Free State, Articles* 64, 70, *and* 72—*Public Safety* (*Powers of Arrest and Detention*) *Temporary Act* (*I.F.S.*), 1924—*Judicial powers—Due course of law.*] The powers of the Oireachtas of the Irish Free State cover the whole area of self-government within the whole area of the Irish Free State, and include power to authorize the detention of untried persons. Within the whole area of the Irish Free State the Oireachtas is a free and unfettered Legislature, and there is nothing in the Treaty or the Constitution or the statute confirming them to limit the power of the Oireachtas to authorize such detention. *Attorney-General for Ontario* v. *Attorney-General for Canada* ([1912] A.C. 571) followed. The Public Safety (Powers of Arrest and Detention) Temporary Act (I.F.S.), 1924, is intra vires the Constitution of the Irish Free State. *Per* Pim J.: Because it was a temporary Act, made in abnormal times, and for a temporary purpose. *R.* (*O'Connell*) v. *Military Governor of Hare Park Camp* K.B.D. (I.F.S.) 104

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HIRING AGREEMENT — hire of hearse and funeral coach by undertaker — notorious trade custom ... 1, 4
See BANKRUPTCY—REPUTED OWNERSHIP.

ILLICIT DISTILLATION—OFFENCE IN ONE PETTY SESSIONS DISTRICT — TRIAL IN DIFFERENT DISTRICT — *Justices— Summary jurisdiction— Constitution of Court of Petty Sessions — Illicit Distillation* (*Ireland*) *Act,* 1831 (1 & 2 *Wm.* 4, *c.* 55), *sect.* 16 *and sects.* 31-41—*Petty Sessions* (*Ireland*) *Act,* 1851 (14 & 15 *Vict. c.* 93)—*Illicit Distillation* (*Ireland*) *Act,* 1857 (20 & 21 *Vict. c.* 40), *sect.* 6 — *Revenue* (*No.* 2) *Act,* 1861 (24 & 25 *Vict. c.* 91), *sect.* 18—*Finance Act,* 1923 (13 & 14 *Geo.* 5, *c.* 14), *sect.* 13, *sub-s.* 4.] A summons under the Petty Sessions (Ireland) Act, 1851, was issued against C. The summons was signed by a Resident Magistrate of the County of Fermanagh, and required C. to attend as defendant at a Court of summary jurisdiction to be held at Lisnaskea, in that county, on 9th February, 1924, to answer a complaint that he had in his possession in a house occupied by him a certain quantity of potale, not being for the purpose of being made into beer for private use, contrary to the Illicit Distillation (Ireland) Act, 1831 (1 & 2 Wm. 4, c. 55), sect. 16. C. attended the Court of summary jurisdiction, and it was contended on his behalf that the Court as then constituted was not a Court of Petty Sessions under the Petty Sessions (Ireland) Act, 1851, and that the Court had no jurisdiction to try an offence committed in a different Petty Sessions district. It was further contended that the Justice who signed the summons did so without jurisdiction in calling on C. to appear before

ILLICIT DISTILLATION—*con.*
a Court other than that to which he was amenable under the Petty Sessions (Ireland) Act, 1851. The Court overruled the objections, and convicted C. of the offence charged against him. Upon an application to make absolute a conditional order for a certiorari to quash the conviction: *Held* by the King's Bench Division, N.I. (Sir Denis Henry, Bart., C.J., and Brown J.), that the Court had jurisdiction to dispose of the case, and that, as this jurisdiction was not limited to any particular part of the county, the conditional order for certiorari should be discharged. *Rex* (*Cassidy*) v. *Justices of Fermanagh* K.B.D. (N.I.) 186

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See BANKRUPTCY—PREFERENTIAL DEBT.

INFANT — CUSTODY — RELIGIOUS EDUCATION — WELFARE OF CHILD — *Habeas corpus—Dead father's express direction—Change of religious education—Separation of family.*] In 1911 M. and E. were married according to the rites of the Roman Catholic Church. E. had been a Presbyterian, but shortly before her marriage became a Roman Catholic. There were three children of the marriage, daughters. In 1920 M. fell into habits of intemperance, and ceased to provide a home for E. and his children. Accordingly, E. brought the children with her to her father's house, who thereafter supported them all; and M. went to live with his brother. At the same time the eldest girl was taken from a Roman Catholic school and was sent to a Presbyterian school, which she continued to attend for nearly two years. In July, 1920, M. made his will, whereby he directed that the children should be brought up in the Roman Catholic faith. After her husband's death, in October, 1920, his widow became once more a Presbyterian, and died in March, 1923, a member of that Church. The children, from the date of their mother's death, continued to reside with their maternal grandfather and grandmother, who brought them up as Presbyterians. The children were respectively aged eleven, six, and four years at the time of an application for a writ of habeas corpus, which was made to the King's Bench Division, Northern Ireland. The Judges (Sir Denis Henry C.J. and Brown J.) having interviewed the eldest girl, were satisfied that she had acquired fixed Presbyterian convictions, held that it would not be for

INFANT—*continued.*
her benefit to hand her over to her paternal relatives, but adjudged that in the case of the two younger children the express directions of their father should be followed. The Court of Appeal (Moore and Andrews L.JJ.) affirmed the judgment of the King's Bench Division in relation to the eldest girl, but allowed an appeal in the case of the two younger children, on the ground that it was for the welfare of all the children that they should be brought up together in the custody of their maternal relatives. The House of Lords affirmed the decision of the Court of Appeal. On the question of the religion in which a young child is to be brought up, it is the welfare of the child which forms the paramount consideration. The wishes of the father are to be considered, and, if there is no other matter to be taken into account, then the wishes of the father prevail. If a sufficient case is made for going contrary to the father's wishes, then the Courts have no hesitation in doing so. *In re Ward, Ward* v. *Laverty*
[K.B.D., APP. (N.I.) 19, 25
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See PRACTICE—SERVICE. 1.

INSURANCE POLICY— EXCEPTIONS —THEFT COMMITTED IN CIRCUMSTANCES AMOUNTING TO RIOT—*Loss by burglary, housebreaking, and theft.*] A policy of insurance effected by the respondents with the appellants against loss by burglary, housebreaking, and theft provided that "this insurance does not cover loss directly or indirectly caused by, happening through, or in consequence of (inter alia) riots." A loss having been incurred by the respondents by a theft, the circumstances of which amounted to riot, the parties went to arbitration as to their rights under the policy. The arbitrators found that the loss was caused by or happened through or in consequence of a riot within the meaning of the policy, and that the claimants were not entitled to recover. In a special case stated for the opinion of the King's Bench Division, the arbitrators set out the circumstances in which the loss occurred, and submitted for the opinion of the Court the question whether on the facts they were entitled so to find. The King's Bench Division answered this question in the negative, and this decision was affirmed successively by the High Court of Appeal

INSURANCE POLICY—*continued.*
in Southern Ireland and the High Court of Appeal for Ireland. The House of Lords, reversing the High Court of Appeal for Ireland, *held* that, inasmuch as the circumstances in which the theft occurred themselves amounted to riot, the resulting loss was within the exception in the policy, and that the arbitrators were justified in their conclusion. *London and Lancashire Insurance Co., Ltd.*, v. *Bolands, Ltd.* H.L. 130

IRISH FREE STATE — COURTS—JURISDICTION — WORKMEN'S COMPENSATION ACT, 1906 (6 & 7 *Ed.* 7, *c.* 58), *sect.* 7—*Seaman injured abroad —British ship—Registered in England —"Same jurisdiction as heretofore" — Irish Free State Constitution Act*, 1922 (13 *Geo.* 5, *c.* 1, *Sess.* 2), *Articles* 73 *and* 75.] Article 73 of the Irish Free State Constitution Act, 1922 (13 Geo. 5, c. 1, Sess. 2), passed by the Imperial Parliament and Dáil Éireann, acting as a Constituent Assembly, enacts that, "subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same, or any of them, shall have been repealed or amended by enactment of the Oireachtas." Article 75 enacts that "until Courts have been established for the Irish Free State (Saorstát Éireann) in accordance with the Constitution, the Supreme Court of Judicature, County Courts, Courts of Quarter Sessions, and Courts of summary jurisdiction, as at present existing, shall for the time being continue to exercise the same jurisdiction as heretofore." An accident, in respect of which a claim for compensation was made, occurred to M. B. on 19th May, 1922, in the harbour of Kingston, Jamaica, on board the respondents' ship, which was a British ship, registered of the port of Liverpool. On September 1st, 1923, after the Constitution had come into operation, and before the establishment of new Courts in the Irish Free State, M. B., who resides within the Free State, issued, in the County Court of Wicklow, a request for arbitration under the Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), between him and the respondents, E. & F., Ltd., English shipowners, having their registered office in London. The respondents applied for a writ of prohibition directed to the County Court

IRISH FREE STATE—*continued.*
Judge of Wicklow, prohibiting him from entertaining the application for compensation, on the grounds that there was no jurisdiction in the County Court Judge of Wicklow to hear or entertain the arbitration proceedings, and that the proceedings had been wrongly instituted there, inasmuch as the subject-matter thereof was without the jurisdiction of the Free State. *Held* (O'Connor M. R. dubitante), affirming the King's Bench Divisional Court (Molony C.J., Dodd J., and Samuels J.), that there was jurisdiction in the County Court of Wicklow to entertain the application, as the two Legislatures had mutually agreed to bind each other's subjects for a specific purpose and for a transitory period. *Rex* (*Armstrong*) v. *County Court Judge of Wicklow* [APP. (I.F.S.) 139

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JUDGE, DUTY OF, to receive evidence tendered and to decide admissibility before evidence given in the hearing of jury—setting aside verdict of jury [193
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JUDGMENT OF CIRCUIT COURT, enforcement of in Irish Free State as judgment of High Court 216
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JUDGMENTS EXTENSION ACT, 1868, in force in Irish Free State 182
See PRACTICE—REGISTERING ENGLISH JUDGMENT.

JUDICIAL POWERS in Irish Free State, extent of—whether the Public Safety (Powers of Arrest and Detention) Temporary Act, 1924 (No. 1 of 1924, I.F.S.), is intra vires the Constitution—Irish Free State Constitution, Articles 6, 64, 70, 72 104
See HABEAS CORPUS.

JURY, SETTING ASIDE VERDICT OF, OR DISCHARGE OF, when inadmissible evidence has been given—Duty of Judge [193

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LANDLORD AND TENANT — LEASE—Term "from" particular date — *Commencement of term — Notice to quit — Correct date for expiration — Writ specially indorsed — Motion for final judgment — Verification of cause of action.*] By an agreement in writing, dated the 1st August, 1920, the defendant agreed to become tenant to K. Brothers of certain premises for three years, and as yearly tenant thereafter, "from the 1st day of September, 1920," at the annual rent of £60 sterling, payable by quarterly payments, the first to be made on the 1st day of December, 1920. And the agreement further provided: "Three months' notice in writing on either side previous to the expiration of the third or any subsequent year to terminate this tenancy." K. Brothers assigned their interest in the premises to the plaintiff on 2nd November, 1922. Plaintiff, on the 1st June, 1923, served the defendant with a notice to quit, requiring her to deliver up possession on the 1st September, 1923. Defendant not having quitted the premises, plaintiff issued a specially indorsed writ, claiming possession. *Held* by the Supreme Court (Kennedy C.J., O'Connor and FitzGibbon JJ.), affirming the decision of Molony L.C.J., that the notice to quit was good, as the 1st day of September, was a correct date for the expiration of the notice, and accordingly the plaintiff was entitled to final judgment for possession. *Per* Kennedy C.J. (FitzGibbon J. concurring): The first day of the term was not the 1st day of September, 1920, but the term commenced immediately on the expiry of that day. *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378, followed by O'Connor J. Plaintiff's affidavit in support of the motion for final judgment stated that K. Brothers assigned their interest in the premises to him, and that he had received rent from the defendant up to the date of the service of the notice to quit. Defendant's affidavit resisting the motion admitted paying rent to the plaintiff, and did not question the validity of the assignment from K. Brothers to the plaintiff. Objection having been taken on behalf of the defendant that the plaintiff only alleged, but had not proved, the assignment: *Held*, that the plaintiff's affidavit was sufficient. *Bruen* v. *Ashmore*, 2 N. Ir. J. R. 4, distinguished. *Dempsey* v. *Tracy* [App. (I.F.S.) 171

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LICENSING ACTS — CERTIFICATE — *Application by holder of a six-day and early closing licence for an ordinary seven-day licence — Intoxicating Liquor Act (Northern Ireland)* 1923 (13 & 14 *Geo.* 5, *c.* 12), *s.* 9.] By section 9 of the Intoxicating Liquor Act (Northern Ireland), 1923 (13 & 14 Geo. 5, c. 12), "From and after the passing of this Act no licence shall be granted for the sale of intoxicating liquor, whether for consumption on or off the premises, except—for premises which are lawfully licensed at the date of the passing of this Act, or which were lawfully licensed at any time since the first day of January, 1920." *Held*, by the King's Bench Division (N.I.) (Sir Denis Henry, Bart., C.J., and Brown J.), that the exception in question did not entitle the holder of a six-day and early closing licence to an ordinary seven-day licence. *Rex* (*Murray*) v. *The County Court Judge of Fermanagh* [K.B.D. (N.I.) 191

MALICIOUS INJURY—Damage to telephone wires — Necessary repairs—*Cost of labour and establishment charges—Compensation—Grand Jury* (*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 135; *Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5.] Telegraph and telephone wires, the property of the Postmaster-General, situate in the division of Downpatrick, in the County of Down, were maliciously damaged. The necessary repair work was executed by four employees of the applicant. *Held*, that the Postmaster-General was entitled to be paid compensation in respect of the

MALICIOUS INJURY—*continued.*
amount of men's wages, time of salaried officer, and establishment charges. *Postmaster-General* v. *Down County Council* APP. (N.I.) 15

MINISTER, Statement by, Not to affect performance of judicial duty 41
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NEGLIGENCE — COLLISION — JOINT TORT-FEASORS — VERDICT AGAINST ONE *defendant—No finding against second defendant — Latter's right to judgment—Exoneration.*] Two defendants, A. and B., were sued jointly for damages caused by their negligence. A. was the owner of a motor lorry, and B., a member of the Civic Guard, was the driver of a motor car. A.'s servant, driving the lorry on his proper side of the road, was overtaken and passed by B., whose car struck the lorry, which swerved, collided with, and knocked down the wall of the plaintiff's cottage. The jury found the defendant B. guilty of negligence, disagreed as to the negligence of A.'s servant, and assessed damages. After the verdict the Judge, at the request of counsel for the plaintiffs, abstained from giving judgment against the defendant B. Subsequently counsel for the defendant A. asked the Judge before whom the action was tried to enter judgment for the plaintiffs against the defendant B., or, in the alternative, to enter judgment for the defendant A. The Judge refused the application. *Held* (Molony C.J. dissenting), that the verdict against B. exonerated A., and that judgment should be entered for the defendant A. *Kennedy* v. *The Merchant Warehousing Co., Ltd., and Maguire* [APP. (I.F.S.) 85

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PRACTICE—CIVIL BILL DECREE — CERTIORARI TO REMOVE INTO HIGH COURT — *Certiorari now necessary—Civil bill decree having the effect of a judgment of the Circuit Court—Enforcement of judgment of Circuit Court as a judgment of High Court—Civil Bill Courts Procedure Amendment Act (Ir.)*, 1864 (27 & 28 *Vict. c.* 99), *sect.* 9 — *Courts of Justice Act*, 1924 (*No.* 10 *of* 1924), *sects.* 21, 51, 60.] An application for a writ of certiorari to remove a decree of a County Court into the High Court under the Civil Bill Courts Procedure Amendment Act (Ir.), 1864, in the Irish Free State, was refused as unnecessary. Such a decree now has the force and effect of a judgment of the Circuit Court, which may be enforced in any part of the Irish Free State in any of the modes in which a like judgment or order of the High Court might be enforced. *Murphy* v. *Walsh* [MURNAGHAN J. (I.F.S.) 216

PRACTICE—NEW TRIAL—NO SUBSTANTIAL WRONG OR MISCARRIAGE—*Improper admission of evidence—Action to have will established—R.S.C.* (*Ir.*), 1905, *Or.* 39, *r.* 7.] The plaintiffs brought an action to establish a will. At the trial evidence was tendered and admitted on behalf of defendant of a memorandum made by a deceased partner in a firm of solicitors giving details of an interview with the deceased. The jury found a verdict for the defendants. On motion for a new trial: *Held* by the Court of Appeal, N.I. (Sir Denis Henry, Bart., C.J., Moore and Andrews L.JJ.), that the memorandum was not admissible as independent evidence of facts recorded therein, but that there was evidence without it sufficient to sustain the verdict, and that the defendant had discharged the onus of showing that no substantial wrong or miscarriage had resulted from its admission, and accordingly that the verdict should stand. *Tait* v. *Beggs* ([1905] 2 I.R. 525) followed. *Mercer and Smyth* v. *Mercer* ... ... APP. (N.I.) 50

PRACTICE — REGISTERING ENGLISH JUDGMENT — *Judgments Extension Act*, 1868 (31 & 32 *Vict. c.* 54), *sect.* 1 — *Application to the Irish Free State—Constitution of the Irish Free State, Article* 73—*Constitution of the Irish Free State* (*Saorstát Éireann*) *Act*, 1922 (*No.* 1 *of* 1922), *Sch. I, Article* 73—*Irish Free State* (*Consequential Provisions*) *Act*, 1922 (13 *Geo.* 5, *Scss.* 2, *c.* 2), *sect.* 1 —*The Government of Ireland Act*,

PRACTICE—*continued.*
1920 (10 & 11 *Geo.* 5, *c.* 67), *sect.* 41, *sub-s.* 1.] The certificate of an English judgment may be registered under the Judgments Extension Act, 1868, in the Irish Free State. Decision of the Court of Appeal in England in *Wakely* v. *Triumph Cycle Co.* ([1924] 1 K.B. 214) not followed. *Gieves* v. *O'Conor* ... MEREDITH J. 182

1. PRACTICE — SECURITY FOR COSTS — AFFIDAVIT — *Or.* 29, *r.* 1.] An application for security for costs under Or. 29, r. 1, must be by summons grounded upon affidavit; and accordingly, when no mention of an affidavit is made in the summons, and no copy is served along with it, the application must be refused. *Hogan* v. *Hogan* ... K.B.D. (I.F.S.) 12

2. PRACTICE — SECURITY FOR COSTS—PARTIAL ADMISSION OF LIABILITY—*Discretion of the Court.*] In an action brought by a plaintiff resident out of the jurisdiction, the defendant, in moving for security for costs, filed an affidavit in which he stated he was prepared to pay £80 of the amount claimed. He also filed a defence, paying £80 into Court, with a denial of liability. *Held*, that in the circumstances the plaintiff should not be ordered to give security for costs. *Furnell* v *Stackpoole* (Milward, 271) and *M'Neany* v. *Maguire* ([1923] 2 I.R. 43) referred to. *Hogan* v. *Hogan* (No. 2) ... K.B.D. (I.F.S.) 14

1. PRACTICE — SERVICE OF WRIT OF SUMMONS OUT OF THE JURISDICTION —*Contract made in Ireland — Insurance policy—Fraud going to root of contract—Arbitration— Condition precedent—Motion to stay action.*] An insurance policy contained (inter alia) the following clauses: — "7. Any material misrepresentation or concealment of or omission to state any circumstance or to give any information material to be known for estimating the risk or the rate of premium or in respect of any claim by or on behalf of the insured shall render this policy absolutely void, and all premiums thereon shall be forfeited to the Association." "12. If any difference or dispute of any kind whatsoever shall arise between the insured or his legal personal representatives and the Association in respect of this policy, or in respect of any claim or of any matter or thing or liability arising or alleged to have arisen hereunder or otherwise connected herewith, directly or indirectly, the same shall be referred to arbitration, in accordance with the provisions of 'The Arbitration Act, 1889,' or any Act or Acts amending that Act. The due observance and fulfilment of the provisions and conditions of this policy shall be a condition precedent to any liability of the Association under this policy; and the hearing of any dispute so referred to arbitration shall be heard at some place within a radius of three miles of the head office of the Association in London." The insured, a plaintiff in an intended action against the insurers, on foot of the policy was given liberty to issue and serve the writ out of the jurisdiction. The insurers applied to set aside the order on the ground that the contract was not made within the jurisdiction of the Court, and, alternatively, to stay the action pending the decision of the matter in dispute by arbitration. The insurers further alleged that material misrepresentations were made by the insured in his proposal, and that consequently the policy was void under clause 7, and that therefore a dispute had arisen which, under clause 12, should be referred to arbitration. *Held*, that (1) on the facts of the case the contract was made within the jurisdiction; (2) the question of misrepresentation was within the arbitration clause of the policy; but there being no express provision making the holding of an arbitration a condition precedent to an action, and an important question of law being involved, viz., whether the Arbitration Act, 1889 (52 & 53 Vict. c. 49), can be made applicable to an Irish contract, the Court, in the exercise of its discretion, refused to stay the action. The question whether the Arbitration Act, 1889 (52 & 53 Vict. c. 49), can be made applicable to an Irish contract was considered, but not decided. *Richardson* v. *Army, Navy, and General Assurance Association, Ltd.*
[K.B.D. (I.F.S.) 96

2. PRACTICE — SERVICE — SUBSTITUTED SERVICE — *Unsafe for civil bill officer to serve writ—Or.* 9, *r.* 5—*Executive Minister's statement— Protection unnecessary — Jurisdiction of Court.*] A writ sent to a civil bill officer for service was returned by him on the ground that it would be impossible and unsafe for him to endeavour to effect personal service without protection. In reply to a letter from the plaintiffs' solicitors asking whether protection would be afforded, the Minister for Home Affairs wrote that he did not consider "that the present state of the country is such as to make

PRACTICE—*continued.*
it necessary to provide military protection for the service of writs." *Held* (reversing Dodd J.), that leave to effect service through the post should be given, and that an Executive Minister had no right to limit the jurisdiction of the Court unless express statutory power was given to him for that purpose; also that no statement by a Minister could or ought to affect a Judge in the performance of his judicial duty. *Irish Agricultural Wholesale Society* v. *St. Enda's Co-operative Society* APP. (I.F.S.) 41

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WILL—*continued.*
the time, and could not remember if E. R. was in the room. Further examined, she deposed that E. R. did not sign in her presence. She had previously stated in a conversation with the solicitor that she and E. R. saw the testatrix sign the will. The second witness, E. R., deposed that A. L. was not in the room when she signed. E. R. also deposed that the word "witness" appearing opposite each of their signatures was not in the will at the time of execution. By direction of the learned Judge at the trial, the jury found that the will had not been duly executed. *Held* by the Court of Appeal (O'Connor M.R. and O'Connor L.J., Ronan L.J. dissentiente), that the presumption of law, "omnia praesumuntur rite esse acta," did not apply; that there was no evidence of due execution; and that the learned Judge was right in directing the jury to find that the will was not properly executed. *Per* O'Connor M.R.: The judgment of Palles C.B. in *Clery* v. *Barry*, 21 L.R.Ir. 152, is an authority for the proposition that it is only when witnesses (or other persons who, though not official witnesses to a will, were present) are dead, or cannot give evidence through incapacity, or their evidence cannot be accepted on account of unreliability, that the doctrine, "omnia praesumuntur rite esse acta," can be applied. It is to be called in aid only when there is a void to be filled. Decisions relating to the application of the presumption of law—"omnia praesumuntur rite esse acta"—considered. *Rolleston* v. *Sinclair* APP. (I.F.S.) 157

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THE END.